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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

MIKHAIL NICHOLAS GORIN, *Petitioner*,
vs.
UNITED STATES OF AMERICA,
No. 87

HAFIS SALICH, *Petitioner*,
vs.
UNITED STATES OF AMERICA,
No. 88

BRIEF FOR PETITIONERS
(After issuance of writ of certiorari.)

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SUBJECT INDEX

The District Court erred in its instructions to the jury and the Circuit Court of Appeals failed to correct such errors, particularly in: (a) instructions construing the provisions of the Espionage Act and leaving it to the jury to define an offense and fix the standard of guilt; and (b) failure to instruct the jury to acquit Gorin and Salich on the conspiracy count of the indictment after the jury had found the defendant, Natasha Gorin, not guilty on that count.

As to (a), the Circuit Court of Appeals held that whether information related to the national defense or not, was a question of fact to be decided

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BRIEF FOR PETITIONERS

THE OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 710) was filed April 22, 1940. It is reported in 111 F. 2d 712; and is printed as Appendix B of the petition for a writ of certiorari.

JURISDICTION

The jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347); and the petition for a writ of certiorari was granted on June 3, 1940.

STATEMENT OF THE CASE

The petitioners were convicted in the U. S. District Court, Southern District of California, Central Division, on three counts of an indictment charging violations of Sections 1, 2 and 4 of the Act of June 15, 1917 (50 U. S. C., Sections 31, 32, 34) which will be hereinafter referred to as the Espionage Act.

The first count of the indictment, based on Section 1 of the Act, alleged that the defendants obtained certain "writings and notes of matters connected with the national defense", to wit, confidential information and reports concerning persons under investigation by the United States Naval Intelligence.[1]

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[1] Section 1 of Espionage Act. (Section 31, Title 50 U. S. C.):
"*Unlawfully obtaining or permitting to be obtained information affecting national defense.* (a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense, owned or constructed, or in progress of construction by the United States or under the control of the United States or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place within the meaning of section 36 of this title; or (b) whoever for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains,

The second count of the indictment, based on Section 2 of the Act, alleged that this alleged "information relating to the national defense" was transmitted and delivered to defendant Gorin as a citzen and representation of the U. S. S. R.[2]

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or attempts, or induces or aids another to copy, take, make, or obtain, any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or (c) whoever, for the purpose aforesaid, receives or obtains or agrees or attempts or induces or aids another to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts or induces or aids another to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this title; or (d) whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, or note relating to the national defense, wilfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or wilfully retains the same and fails to deliver it on demand to the officer or employee of the United States, entitled to receive it; or (e) whoever, being intrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, or information, relating to the national defense, through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or both." (June 15, 1917, c. 30. Title I, Sec. 1, 40 Stat. 217.)"

[2] Section 2 of Espionage Act (Section 32, Title 50 U. S. C.):

"*Unlawfully disclosing information affecting national defense.* Whoever, with the intent or reason to believe that it is

The third count of the indictment, based on Section 4 of the Act, alleged a conspiracy to communicate and transmit to Gorin the aforesaid "information relating to the national defense".[1]

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to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to, or aids or induces another to, communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years: *Provided*, That whoever shall violate the provisions of subsection (a) of this section in time of war shall be punished by death or by imprisonment for not more than thirty years; and (b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years. (June 15, 1917, c. 30, Title I, Sec. 2, 40 Stat. 218.)".

[1] Section 4 of Espionage Act (Section 34, Title 50 U. S. C.):

"*Conspiracy to violate preceding sections.* If two or more persons conspire to violate the provisions of sections 32 or 33 of this title, and one or more of such persons does any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as in said sections provided in the case of the doing of the act the accomplishment of which is the object of such conspiracy. Except as above provided conspiracies to commit offenses under this chapter shall be pun-

There is no substantial dispute about the facts constituting the alleged crimes for which petitioners were convicted, but the cases present the following important questions of law:

1. Did the admittedly wrongful acts of the petitioners in revealing certain information in government files come within the criminal offenses *specifically* defined in the Espionage Act?

2. Did these admittedly wrongful acts come within the criminal offenses which the government contends are defined in the *general prohibitions* of the Espionage Act—prohibitions against disclosing information "connected with the national defense" or "relating to the national defense"?

3. Can the statute be constitutionally construed, as it has been in the present cases, to make it a crime to reveal any information regarding *anything which a jury might believe* to be "connected with" or "relating to the national defense"?

Dependent upon the answers to those major questions are presented the following incidental questions:

(a) Was the jury properly instructed as to the law?

(b) Should demurrers to the indictment have been sustained?

(c) Should the court have directed a verdict in favor of the defendants?

(d) Upon the acquittal of Gorin's wife of the conspiracy charged in the third count of the indictment, should not the remaining two petitioner-defendants also have been acquitted on that count?[1]

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ished as provided by section 88 of Title 18. (June 15, 1917, c. 30, Title I, Sec. 4, 40 Stat. 219.)"

[1] Natasha Gorin, wife of petitioner Gorin was included in the conspiracy indictment but was acquitted on the trial.

THE UNDISPUTED FACTS

The statement of facts presented in the opinion of the Circuit Court of Appeals can be accepted as accurate and substantially complete. The following statement is not in conflict with that of the Circuit Court of Appeals but supplements it by calling attention to additional pertinent facts not in dispute.

Gorin is a citizen of the U. S. S. R. who, together with his wife, entered the United States on a passport in 1936 as a representative of Intourist, Moscow, to aid in the tourist business. He was employed by Intourist, Inc., a New York Corporation, which maintains an office at Los Angeles and had charge at that office (R. 145).

Salich was born in Russia; came to the United States in 1923. After naturalization he served on the police force in Berkeley, California from 1930 to 1936 and began employment with the U. S. Naval Intelligence office on August 19, 1936. (R. 331.) He was employed as an investigator in the San Pedro office with the duty of collecting information and working on reports.

Gorin met Salich in 1938 and told him that he was interested in obtaining information about Japanese activities in that area for use in the event of trouble between Japan and Russia, but that Russia was friendly to the United States and he wanted no information that would be considered against the interest of the United States. (R. 169, 178, 336.) Gorin said he was not interested in anything pertaining to the United States. Salich reported the suggestions of Gorin to his superior, Lieutenant Commander Roachefort (R. 337, 340, 135) and testified on the trial that he was instructed to keep

up his contacts with Gorin, exchange harmless information and see what could be obtained in return. (R. 337.)

Salich was in financial difficulties and, as his acquaintance and contacts with Gorin increased, he accepted Gorin's offer of financial assistance, so that over a period from March to December 10, 1938, he received a total of $1,700 from Gorin (R. 350, 360), which he stated he took as a loan to be repaid as soon as possible; but he did not inform his superiors that he was receiving money from Gorin.

When Salich was interrogated for the first time by the F. B. I. office on December 19, 1938, he talked freely of his relationship with Gorin, revealing all the information he had turned over to Gorin, seeking to excuse the impropriety of his acts by asserting that there was no information in any way prejudicial to the United States. Salich had furnished information which came in part from the files and data of the Office of Naval Intelligence. He did not give Gorin any actual files or reports, but either oral information or typewritten notes. The reports can be classified as follows:

First: Reports concerning movements and activities of certain Japanese persons in this country, including civilians, military and naval officers, diplomatic and consular attaches, and civil or commercial representatives, some of whom were apparently suspected of espionage within the United States.

Second: Reports regarding suspected Japanese activities outside the United States, principally in Mexico and Mexican waters.

Third: Reports concerning certain alleged communists in the United States, whose activities were discussed.

There were no reports of any kind which in any way concerned or had any reference to the United States navy or army or any part of the naval or military establishment, or any place connected therewith, or anything whatever relating to the functioning, or means of functioning of the army or navy or any of the proscribed places or things specified in Section 1, of the Espionage Act.

The Opinion of the Circuit Court of Appeals definitely states:

> "*None of the reports contained any information regarding the army, the navy, any part thereof, their equipment, munitions, supplies of aircraft or anything pertaining thereto.** One report named a number of Japanese 'suspected' of being interested in intelligence work. Most of them, on their face, appear innocuous, there being no way to connect them with other material which the Naval Intelligence may have, so that the importance of the reports does not appear." (*Gorin* v. *U. S.*, 111 F. 2d 712, 716.)

The free and full disclosures by Salich of his relations with Gorin and all that he did, eliminated any substantial issue of fact from the trial and none is presented or involved in this review.

There is, however, a very important issue of law as to the scope and constitutional construction of the Espionage Act. Upon this issue the trial court gave conflicting instructions and the Circuit Court of Appeals has expressly held that the law is in doubt and can only

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* Italics throughout brief are ours unless otherwise indicated.

be settled by a ruling of the Supreme Court. The question presented, in brief, is: What are criminal offenses under the Espionage Act?

There is no question but that the acts of Salich, in revealing information of at least a semi-confidential character in the files of a government office, were wrongful; and the acts of Gorin in inducing such disclosures were wrongful. But since it would not be contended that any government employee could *always* be convicted under the Espionage Act for improperly disclosing *any* of the contents of government files, the question presented by this case is: What disclosures of information are prohibited by the Espionage Act?

The trial court construed the law in two different ways and gave to the jury conflicting instructions—first instructing the jury that disclosures of information, to come within the prohibitions of the Act, must be information relating to the places and things specifically enumerated in Section 1 of the Act; that is, information concerning vessels, aircraft, naval stations, dock yards, canals, etc. This instruction was in accord with contentions of counsel for the defendants. The Court of Appeals held that such instructions were erroneous, but since they were "favorable to Appellants they are in no position to allege error in that respect". (*Gorin* v. *U. S.*, 111 F. 2d 712, 719.)

However, the trial court negatived the favorable character of these instructions by leaving the question wholly to the jury to decide as to whether the information obtained in this case "concerned, regarded or was connected with the national defense". This, the court held, was "a question of fact solely for the determination of this jury". (*Gorin* v. *U. S.*, 111 F. 2d 712, 717, 719.)

The dominant legal issue was presented to the Court of Appeals in the language of counsel for defendants, which was quoted by the court in the following sentences from its opinion:

> "It is urged that under such construction, the statute is unconstitutional because it 'would fix no immutable standard of guilt to govern conduct and would give no fixed and definite meaning * * * but would be subject to definition as to meaning by each court and jury' ". (*Gorin* v. *U. S.*, 111 F. 2d 712, 719.)

The Court of Appeals in its opinion reviewed the two lines of cases in the Supreme Court—those holding that broad terms in certain statutes were sufficiently definite to meet constitutional requirements and those holding that the terms used in other statutes were too vague and indefinite. Then the court observed:

> "In logic, the statute here involved could be said to be analogous to some of the cases involved in the first group, and to be analogous to some of those involved in the second group. No workable statement of differentiation is apparent from these decisions. Apparently the question has been decided in the above mentioned cases on the basis of appeal of the contention to the court in each individual case rather than by measurement with a definite rule. *Because of the doubt as to the controlling group of cases, we assume that the rebuttable presumption of constitutionality has disappeared.* However, the result is controlled by the rule that 'It is incumbent * * * upon those who affirm the

unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt'. Legal Tender Cases, 79 U. S. (12 Wall.) 457, 531. We hold that appellants have failed to carry the burden of proving unconstitutionality of the statutes involved." (*Gorin* v. *U. S.*, 111 F. 2d 721.)

Thus it appears that convictions of Petitioners have been upheld by the Circuit Court of Appeals on the somewhat unusual basis that it is doubtful whether the Espionage Act can be constitutionally construed to define the crime for which they have been convicted. But since the doubt is not a doubt regarding what they did, but a doubt as to whether what they did is a crime, the convictions are upheld upon the assumption that the Supreme Court will resolve the doubt as to whether they should or should not have been convicted by giving an authoritative construction to the Espionage Act. Regardless of the interests of present Petitioners, it is submitted that a reversal of the judgments herein, with a clear and constitutional construction of the Act, is a matter of greatest public concern, particularly in a time such as the present, when it is gravely important that the law regarding espionage should be clearly defined so that, on the one hand, it may not be violated ignorantly, and, on the other hand, there may be assured punishment for those whose activities may be actually harmful to the United States.

A further statement of the case is not necessary for a decision upon the dominant issue: a constitutional construction of the Espionage Act. But to shed further light on the minor issues raised by instructions of the

court—and failures to instruct—we present in the Appendix a more detailed statement of the case summarizing the evidence and reviewing the conceded facts. (See Appendix A, page 63.)

THE STATUTES INVOLVED

The pertinent sections of the Espionage Act, Sections 1, 2 and 4 of the Act of June 15, 1917 (50 U. S. C. Sections 31, 32, 34) were reproduced in the appendix of the petition for a writ of certiorari and have been again reprinted in this brief in notes on pages 75 to 93.

Attention should also be called to the amendment to this Act, approved March 28, 1940, (U. S. C. Congressional Service, Acts of 76th Congress, Third Session) whereby the penalties for violation of Section 1 were severely increased. While this amendment does not affect the present case directly, it does show a recent construction of the Act by the Congress construing the offenses defined therein as serious and not trivial offenses, requiring clear definition if the constitutionality of the Act is to be sustained.[1]

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[1] "Section 1 of title I of the Act entitled 'An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes', approved June 15, 1917, as amended, is amended by striking out 'shall be punished by a fine of not more than $10,000 or by imprisonment for not more than two years, or both', and inserting in lieu thereof the following: 'shall be punished by imprisonment for not more than ten years and may, in the discretion of the court, be fined not more than $10,000'." (Section 1, Act of March 28, 1940.)

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in not holding either that the acts for which petitioners were indicted and convicted were not made criminal offenses in the Espionage Act; or (in the alternative) that those provisions of the Espionage Act were unconstitutional (being in violation of the Fifth and Sixth amendments) which defined a criminal offense so vaguely that it was left to a jury to determine what information was "connected with the national defense" or "relating to the national defense", and thereby to make it a crime to obtain or reveal such information.

2. The Circuit Court of Appeals erred in failing to hold that the District Court erred in overruling demurrers and in denying motions to dismiss and direct a verdict of acquittal at the close of the opening statement of United States attorney. Gorin assignments of error I and II (R. 631). Salich assignments of error I and II (R. 524).

3. The Circuit Court of Appeals erred in failing to hold that the District Court erred (a) in denying motion in arrest of judgment (Gorin assignments of error LX (R. 695)) and (b) in denying a motion for a new trial. Gorin assignment of error LX (R. 695). Salich assignment of error LXXVI (R. 615).

4. The Circuit Court of Appeals erred in failing to hold that the District Court erred in instructing the jury as to the meaning of the term "national defense". Gorin assignments of error XLV, XLVI, XLVIII, L, LI (R. 669 et seq.) Salich assignments of error LXXII, LXXIII, and LXXIV (R. 604 et seq.).

5. The Circuit Court of Appeals erred in failing to hold that the District Court erred in instructing the

jury as to the nature and quality of intent required under the Espionage Act. Gorin assignments of error LXVII (R. 677) LII (R. 686) LV, LVI (R. 689-692).

6. The Circuit Court of Appeals erred in failing to hold that the District Court erred in admitting into evidence the written "reports" from the files of the Naval Intelligence; Gorin assignments of error IX, XLI, inclusive, and XLIII (R. 641 et seq.); Salich assignments of error XVII to LIX, inclusive (R. 567 et seq.).

7. The Circuit Court of Appeals erred in failing to hold that the District Court erred in denying motions for a directed verdict at the conclusion of the government's case. Gorin assignment of error XLII (R. 666).

SUMMARY OF ARGUMENT

THE DOMINANT ISSUE

It is the contention of petitioners that although it was entirely improper for Salich to furnish and Gorin to obtain information contained in reports in the Naval Intelligence files, these acts were not made offenses under the Espionage statute, because none of the information in the reports related to the "national defense" as that term is used and defined in the statute. The statute specifically prohibits spying upon forts, navy yards, etc., or obtaining prints, maps, codes, etc., and its general prohibition regarding things "connected with" or "relating to" the national defense cannot be construed to make it a crime to obtain or reveal information regarding anything which a jury might believe to be connected with or relating to the national defense. Otherwise, it would be left to a jury to decide in each instance whether it was a crime for a man to obtain or reveal information regarding such subjects as fuel and food supplies and manufacturing capacity and transportation facilities, which are matters commonly the subject of investigation and report, but which, in a broad sense, might be regarded as connected with or related to the national defense. Petitioners contend, and at all stages of the case asserted that the Espionage Act makes it a crime only to obtain or reveal information concerning those places and things specifically described in the Act as connected with or relating to the national defense; and that any other construction of the Act would make it unconstitutional. If the Act ought to be extended to cover the revelation of anything contained in any government reports, the Act should be amended by Congress, but not by judicial construction. This is the

dominant and highly important issue presented in the present case.

POINT I

The Espionage Act makes it a crime only to reveal information concerning the places and things specifically listed in Section 1 of the Act, because —

(a) The history of the Espionage Act proves that a broad definition of "national defense" was stricken out of the bill and a specific list of places and things written into Section 1 for the very purpose of preventing the Act from being given the broad construction which it has now received.

(b) A grammatical construction of Sections 1, 2 and 4 of the Espionage Act supports the contentions of petitioners.

(c) The construction placed on the Espionage Act by the lower courts would render it unconstitutional. The opinion of the Circuit Court of Appeals concedes the doubtful constitutionality of its construction of the Act.

(d) Under strict construction of the Espionage Act, which is the necessary construction to be given to a penal statute and particularly to language creating a crime, the petitioners were convicted of a crime not defined by the Act.

The Espionage Act, under which Gorin and Salich were convicted makes it a crime (Sec. 31. Title 50 U.S.C.) for anyone to obtain information concerning "any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, *or other place connected*

with the national defense . . . etc.); or "to copy . . . any sketch, photograph . . . document writing or note of *anything connected with the national defense* . . . etc.).

A reading of the entire Section makes it clear that, under the lower court's construction of the Act, it is made a crime for *anyone* to obtain *any* information *anywhere* which a jury may believe is "connected with the national defense" or "relating to the national defense"—if the jury also believes that accused had the "intent or reason to believe that the information to be obtained is to be used to the injury of the United States *or* to the advantage of any foreign nation."

We submit that the Act cannot be held constitutional unless it is construed so as to make it a crime only to obtain information as to the places and things specifically listed in Sec. 1 as connected with or related to the national defense. Thousands of persons are constantly collecting and reporting information about matters which are more or less closely "connected with or related to the national defense"—such as, appropriations for military purposes; manufacturing capacity for military supplies; productive capacity and reserve supplies of metals and foods essential to national defense; the numbers, equipment and condition of our armed forces; the financial strength and general economic condition of particular industries and of the country as a whole.

It must be evident that, while enormous quantities of such information are being freely collected and published in America, it cannot be lawful and praiseworthy for patriotic organizations, business men, and newspapers to use such information, for example, in criti-

cisms of the government (which many a jury of twelve men might think injurious to the United States, or certainly "to the advantage of any foreign nation")—but at the same time a criminal offense for some foreign agent to obtain and transmit it to his government.

The Opinion of the Circuit Court of Appeals further explains the harmless character of the information disclosed in the present case, as follows:

> "One of the reports contained information regarding the activities of Japanese fishing boats, and of an acid said to have been deposited in salt water with which it reacted and caused a steel cable and a steel hull of a ship to be corroded through chemical action. This report was dated June 27, 1938. Practically everything which was contained in the report appeared in a printed periodical subsequently. (Ken Magazine, July 27, 1939.) *Other issues of the same periodical contained information of the same general nature as that contained in the reports.* (Ken Magazine, Vol. 1, No. 1, p. 40, April 7, 1938; Ken Magazine, April 6, 1939.)" (*Gorin* v. *U. S.*, 111 F. 2d. 712, 716.)

Our government is a *public* operation. Information about all government activities, all information collected by the government and general information about matters of public concern, are open to public consideration *unless* by specific laws certain matters are defined as secret and disclosures are specifically prohibited.

There are obviously many matters connected with or relating to the national defense which should be kept secret. Perhaps all the files in the war and navy departments—all official information in these depart-

ments—should be kept secret except for disclosures expressly required or permitted by law.

But the truth is that the Congress has never been willing to enact such laws—even in time of war—because of the belief that public information and discussion of many matters connected with or relating to the national defense are essential to the *national defense of a free government.*

It is surprising to find no reference to the history of the Espionage Act in the Opinion of the Circuit Court of Appeals. In the brief of Petitioner-Appellant Gorin, extended consideration was given to the history of the Act and it was there shown that although the statute was passed in time of war there was a frequently expressed intention to avoid general terms and broad definitions under which too much power might be lodged with executive officials and too little information available to the public.

Among other things it was shown in that brief (and herein, *infra*) that a broad definition of the term "national defense" was stricken out of the bill by the Conference Committee and the specific list of places and things now in Sec. 1 was added for the reason explained by the Conference Committee as follows:

"Section 1 sets out the places connected with the national defense to which the prohibitions of the Section apply, while a similar provision of the House bill designates such places in general terms". (Conference Report H. R. 65, 65th Congress, 1st Session.)

Also the Conference report explained significantly the addition of another Section (now Section 6), which provides in part as follows:

"The President in time of war or in case of national emergency may by proclamation designate any place other than those set forth in subsection (a) of section one hereof in which anything for the use of the Army or Navy is being prepared or constructed or stored as a prohibited place for the purposes of this title; Provided, That he shall determine that information with respect thereto would be prejudicial to the national defense."

The Conference Report said about this Section:

"It was adopted because of the changes made in Section 1 and for the further reason that Section 1202 of the House Bill, which gave the words 'national defense' a broad meaning, was stricken out."

The legislative history of the Espionage Act therefore shows that changes in the Act as it passed the House were deliberately made for the very purpose of preventing the Act from being given such a broad construction as it has now received.

As previously pointed out, the trial court partially accepted the construction of the Act now urged on the basis of its history, but then negatived the value of the early instructions to the jury by leaving it wholly to the jury to determine whether the information disclosed in this case "concerned, regarded or was connected with the national defense" and also instructed the jury that it was *not* essential "that the documents or information alleged to have been taken necessarily injure the United States or benefit any foreign nation". So the defendants were tried and convicted on the theory that the Espionage Act defined it to be a crime (and constitutionally

could define it to be a crime) if any person should obtain any information which a jury might believe to be connected with or relating to the national defense, if the informant or procurer had reason to believe that the information would be "to the advantage of a foreign nation", regardless of whether it was to be used to the injury of the United States.

Yet, the "advantage" of a foreign government must also connote the *disadvantage* of our government. Otherwise why are we concerned to make it a crime to do something *not* harmful to the United States?

There are two vital objections to any such construction of the Espionage Act:

First: The Act need not be so construed and in the light of its history ought not to be so construed.

Second: If the Act were so construed, it would be unconstitutional because it would be impossible for anyone to obtain or disclose information regarding matters which are well known and publicly discussed throughout the United States, without the risk of being convicted of a felonious crime, if a jury should believe that such information was connected with or related to the national defense and was obtained or disclosed to the advantage of some other nation.

Two quotations from leading cases will make Petitioners' contention quite clear.

> "Therefore, because the law is vague, indefinite, and uncertain and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is uncon-

stitutionally invalid, and that the demurrer offered by the defendant ought to be sustained".

United States v. Cohen Grocery Company, 255 U. S. 81.

"No one may be required at peril of life, liberty and property to speculate as to penal statutes. All are entitled to be informed as to what the state commands or forbids. * * * And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning, and differ as to its application, violates the first essential of due process of law".

Lanzetta v. New Jersey, 306 U. S. 451.

POINT II

The information revealed by petitioners was so "innocuous" (as described by the Circuit Court of Appeals) that the revelation could not be "to the injury of the United States or to the advantage of any foreign nation", as required by the statute; and, since "none of the reports contained any information regarding the army, the navy, any part thereof, their equipment, munitions, supplies, or aircraft or anything pertaining thereto" (again quoting the Circuit Court of Appeals), there should have been a directed verdict of acquittal. A detailed analysis of these reports will fully support this conclusion and such an analysis is presented in the Appendix. (See Appendix B, p. 75.)

POINT III

The District Court erred in its instructions to the jury and the Circuit Court of Appeals failed to correct such errors, particularly in: (a) instructions construing the provisions of the Espionage Act and leaving it to the jury to define an offense and fix the standard of guilt; and (b) failure to instruct the jury to acquit Gorin and Salich on the conspiracy count of the indictment after the jury had found the defendant, Natasha Gorin, not guilty on that count.

As to (a), the Circuit Court of Appeals held that whether information related to the national defense or not, was a question of fact to be decided by the jury. This is a construction of law which we submit would make this provision of the Espionage Act unconstitutional.

As to (b) the Circuit Court of Appeals indicated that the court might have erred, but since the sentences on all three counts of the indictment ran concurrently, it was immaterial whether the conviction of present petitioners on the third count was right or wrong.

ARGUMENT

POINT I

The Espionage Act makes it a crime only to reveal information concerning the places and things specifically listed in Section 1 of the Act because—

(a) The history of the Espionage Act proves that a broad definition of "national defense" was stricken out of the bill and a specific list of places and things written into Section 1 for the very purpose of preventing the Act from being given the broad construction which it has now received.

In case of doubt as to the intention of Congress in employing certain terms and in determining the meaning to be given to words used in a statute, it is permissible to resort to the legislative history of the Act in order to show the intent of Congress in finally arriving at the wording it employs in a certain Act. (59 *Corp. Jur.* 1017; *Penn Mutual Life Ins. Co.* v. *Lederer*, 252 U. S. 523, 64 L. Ed. 699 (1920); *Prussian* v. *U. S.*, 282 U. S. 675, 75 L. Ed. 610 (1931); *U. S.* v. *Katz*, 271 U. S. 354, 70 L. Ed. 986 (1926); *Graham* v. *Goodall*, 282 U. S. 408, 75 L. Ed. 415 (1931).)

The present Espionage Act was enacted in 1917. During the first part of that session of the Congress, similar bills were introduced into both the House and the Senate. When the Senate Bill came to the House for approval, the House did not accept the Senate Bill, except the enacting clause, and substituted the contents of its bill for the remaining part of the Act. The Senate refused to approve the change. The bill went to con-

ference. The following discussion is based upon the printed reports of committee hearings, the House committee report, and thereafter the conference reports to the two Houses.

Action of House of Representatives

The proposed House Bill, introduced April 2, 1917, on the same day President Wilson asked Congress to declare war on Germany,[1] used language in part quite similar to the then espionage statute of 1911. Section 2 of the Act defined a crime premised upon violation of Section 1. The Judiciary Committee considered the bill and changed its whole form and structure.

The Committee Report to the House by Mr. Webb on April 25, 1917,[2] revised the form of the act, and recommended favorably the Bill reading in part as follows:

> "Section 1. Whoever, with intent or knowledge, or reason to believe that the information to be obtained is to be used to the injury of the United States, copies, takes, makes, or obtains, or attempts to copy, take, make or obtain, any sketch, photograph, photographic negative, blueprint, plan, model, instrument, appliance, document, writing, code book, or signal book, connected with the *national defense*, or any copy thereof, or with like intent or knowledge, or reason to believe, directly or indirectly, gets or attempts to get information concerning the national defense, shall, upon conviction thereof be punished by a fine of not more

[1] 65th Congress, 1st Session, H. R. 291.
[2] 65th Congress, 1st Session, Report No. 30.

than $10,000, or by imprisonment for not more than five years, or both.

* * * * * * *

"Section 1202. *The term 'national defense' as used herein shall include any person, or thing in any wise having to do with the preparation for or the consideration or execution of any military or naval plans, expeditions, orders, supplies, or warfare for the advantage, defense or security of the United States of America.*"

It will be noted that Section 1 of Title 1 of the Committee's redraft did not in any way attempt to particularize the meaning of the words "national defense," but merely contains language now found in subsection (b) (and in part (c)), Section 1. However, Section 1202 of Title 12 of the redraft specifically defined the term "national defense" as to be used in the proposed Act.

In the original H. R. 291, Section 6 read as follows:

"The President of the United States shall have power in time of war or in case of national emergency to designate any place other than those set forth in paragraph (a) of section one hereof in which anything for the use of the Army or Navy is being prepared or constructed or stored as a prohibited place for the purposes of this chapter on the ground that information with respect thereto would be prejudicial to the national defense; *he shall further have the power, on the aforesaid ground, in time of war or in case of national emergency, to designate any matter, thing, or informa-*

tion belonging to the Government, or contained in the records or files of any of the executive departments, or of other Government offices, as information relating to the national defense, to which no person unless duly authorized shall be lawfully entitled within the meaning of this chapter."

This section was amended in the course of the proceedings so as to delete the broad powers and extended purposes set forth in the italicized portions. The proposed legislation went to conference and there was presented the Conference Report of the Managers on the part of the House. As reported out on May 29, 1917, it read as follows:[1]

> "The President of the United States shall have power in time of war or in case of national emergency may by proclamation designate any place other than those set forth in subsection (a) of section one hereof in which anything for the use of the Army and Navy is being prepared or constructed or stored as a prohibited place for the purposes of this title; provided that he shall determine that the information with respect therto would be prejudicial to the national defense."

It will be noted that, in the original Bill (H. R. 291), the President was given power to designate "*any matter, thing or information belonging to the Government or contained in the records or files of any executive department*" as information relating to the national defense. *This provision was stricken by subsequent amendments to the Bill.*

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[1] 65th Congress, 1st Session, Report No. 65.

Conference Reports

In a subsequent Conference Report, dated June 6, 1917,[1] there was a "Statement by the Managers on the Part of the House," which, in part, read as follows:

"On May 4, 1917, when the House passed this bill and sent it to the Senate, the Senate was already considering a similar bill (S. 2) which had been introduced in the Senate. The Senate continued the consideration of its bill and after perfecting and agreeing to it, took up the House bill and without considering it in its detailed provisions, adopted the Senate bill, as it had been perfected, as an amendment for the House bill by striking out all of the House bill after the enacting clause and substituting the Senate bill, as it had been agreed upon in the Senate. It therefore became the duty of the conferees to weld these two bills into one by adopting the provisions from one or the other with such amendments as seemed necessary to the conferees, within the limits of the conference, to perfect the bill and bring its various provisions into harmony.

"In the main the two bills contained similar provisions, but expressed in different language. The conferees took up the Senate amendment and made it the basis of their final agreement. Some of the sections were agreed to as written, others were amended so as to embody provisions contained in the House bill, or sections from the House bill were substituted for them, and in a few instances sections were rewritten in conference in order to harmonize the views of the two Houses.

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[1] 65th Congress, 1st Session, Report No. 69.

"It would be very difficult to point out in minute detail the difference between the bill as it passed the House and that agreed upon in conference, and this would serve no very useful purpose, since they can be easily ascertained by a comparison. The material changes made in the House bill are, however, pointed out below.

TITLE I.—ESPIONAGE.

"The several provisions under this title in the conferees' report do not materially change the provisions of this title as passed by the House. *Section 1 sets out the places connected with the national defense to which the prohibitions of the section apply* while the similar provision of the House bill designates such places in general terms.

"Section 2 of the House bill made the person guilty for doing the things enumerated therein "with intent or knowledge, or reason to believe that it is to be used to the injury of the United States." Under section 2 (a) as agreed upon, this provision is made to read, "with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation.

* * *

"Section 6 was not in the House bill, but was taken from the Senate amendment. It was adopted because of the changes made in section 1, and for the further reason that *section 1202 of the House bill, which gave the words 'national defense' a broad meaning, was stricken out.*"

This report shows that the Conference Committee

of the two Houses made the following significant changes:[1]

1. The list of places and things now set forth in Section 1 was added to the original House Bill, to read as follows:

> "Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used in the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any *vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless or signal station, building, office, or other place connected with the national defense*, owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers or agents, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, or stored, under any contract or agreement with the United States, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place within the meaning of section 6 of this title . . ."

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[1] Conference Report of June 6, 1917, 65th Congress, 1st Session, No. 69, cited supra.

2. The present Section 6 was added (Section 7 in the first conference report (No. 65), Section 6 in the second conference report (No. 69)), which reads as follows:

> "The President in time of war or in case of national emergency may by the proclamation designate any place other than those set forth in subsection A of section one hereof in which anything for the use of the army or navy is being prepared or constructed or stored as a prohibited place for the purpose of this title; provided that he shall determine that information with respect thereto would be prejudicial to the national defense."

3. The third change made was to omit the definition of the term "national defense" (Section 1202). In commenting upon these changes (H. R. 69), the Conference Committee reported as follows:

> "The several provisions under this title in the conferees' reports do not materially change the provisions of this title as passed by the House. *Section 1 sets out the places connected with the National Defense to which the prohibitions of the House bill designate such places in general terms.*"

As to the omission of Section 1202 (defining "national defense"), the conferees commented as follows:

> "Section 1202 has been stricken out for the reason that the amendments in the several sections of the bill made this section unnecessary."

Upon the addition of the present Section 6 and the omission of the definition of the "national defense" as

in the proposed House Bill, the conferees commented as follows:

> "Section 7 (later Section 6, now Section 36) was not in the House Bill but was taken from the Senate amendment. *It was adopted because of the changes made in Section 1 and for the further reason that Section 1202 of the House bill which gave the words 'national defense' a broad meaning, was stricken out.*"

It should also be noted that when the Conference Committee had reported (Report No. 65), and the bill was up for discussion, the following occurred:[1]

> "Mr. Webb. Mr. Speaker, the managers of the conference on the part of the House have tried to perform their duty with respect to this difficult bill conscientiously and effectively, and, generally speaking, I may say that the bill presented to you today is practically the bill as it passed the House. *The only changes that have been made worth mentioning are in the espionage section proper, and there we agreed as to the particular designation of what matters should not be entered upon or flown over, instead of the 'national defense' as a general description* * * *."

The Congress, therefore, in enacting the Espionage Act, definitely intended that a limited meaning should be given the words "relating to the national defense," intending to include only those matters and things specifically enumerated and referred to in Section 1.

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[1] Congressional Record Proceeding of the House, May 31, 1917, p. 3131. Appendix F.

Furthermore, Congress in 1938, enacted statutes specifically prohibiting and regulating the photographing, sketching, etc., of defensive "installations and equipment" whenever in the interest of the national defense, the President shall define them as "requiring protection." [1] The Committee reporting the proposed legislation said, "There is no existing law which will accomplish the results sought by this bill." [2] No necessity would have existed for this enactment if the Congress had agreed with broad definition of "national defense" contended for by the Government in this case.

(b) A grammatical construction of Sections 1, 2 and 4 of the Espionage Act supports the contentions of petitioners.

The words "information respecting the national defense" are first used in Section 1 (a) to fix the "purpose" with which the acts committed must be done in order to constitute a crime. Then, in listing the acts proscribed, the word "information" is used specifically with reference to *places* or *things* therein set forth.

Only in subdivision (a) of section 1 and in section 6, which incorporates part of Section 1 by reference, is there any use of the words "information concerning" and "information with respect thereto." [3] *And in both*

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[1] Title 50, Sec. 45, et seq., enacted Jan. 12, 1938.

[2] 75th Congress, 1st Session, Report No. 108.

[3] Section 6 (Title 50 U. S. C., Sec. 36) reads as follows:

"*Designation of prohibited places by proclamation.* The President in time of war or in case of national emergency may by proclamation designate any place other than those set forth in subsection (a) of section 31 of this title in which anything for the use of the Army or Navy is being prepared or constructed or stored as a prohibited place for the purposes of this chapter: *Provided*, That he shall determine that information with respect thereto would be prejudicial to the national defense." (June 15, 1917, c. 30, Title I, Par. 6, 40, Stat. 219.)

instances the "information" referred to concerns specifically the places and things enumerated and described in detail in the statute. In other words, the subject matter of subdivision (a) of section 1 and of section 6 specifically concerned itself with military objects either therein specifically defined or which, after a determination by the President, proclaimed such that "information with respect thereto" would be prejudicial to the national defense. As stated, these are corporeal, physical, well-defined and commonly known objects and things determined by Congress, or by the proclamation of the President, to be necessary incidents and a part of the national defense of the United States. *It is only "information concerning" or "information with respect" to such specific objects and places that it is put under the ban and prohibition by Congress.*

It will be noted that the word "information" is not used in subdivision (b) of section 1, except as a recital. Section 2, as noted hereinafter, is identical as to designation of things included within the statute with subdivision (b), except that in subdivision (b) there is the reference to "anything connected with the national defense," and in section 2 the word "information" is included in addition to the objects and things specifically described.

Therefore, when we come to analyze and try to give proper meaning to the term "information relating to the national defense" as used in section 2 of the statute we must consider and give weight to the fact that Congress must have used the term "information" with specific reference to its use and fixed meaning as found in subdivision (a) of section 1 and section 6.

There is a canon of construction which requires that where a word is used in a statute in several different

places, the first use and designation thereof in the statute which gives the meaning must be taken as the defined meaning for the purpose of the remainder of the statute. And of course the Espionage Act must be read as a whole because section 2 and the other sections specifically refer back to the subject matter of section 1.

Particularly is this argument given support when we examine subdivisions (b) of section 1 under which the first count of the indictment here is drawn. It will be noted that such section refers to specific *objects connected with the national defense and at no place (except as a recital) refers to "information"* either relating to or connected with the national defense.

Section 1 (b) proscribes and makes a crime of the obtaining of certain fixed and well-defined items and objects, to-wit: any sketch, photograph, photographic negative, blue print, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense." *The word "anything" here must be given its meaning as a pronoun.* As such pronoun it must refer back to the objects and things specifically described next preceding it; and that is to say, it must refer back to "any sketch, photograph," etc. The phrase "or note of anything" as used in subdivision (b) must therefore mean a note of one of the objects or things thereinbefore specifically described in subdivision (b), or must refer back to the specific place, objects and things enumerated in subdivision (a).

Section 2, as stated above, specifically described the exact items and things enumerated exactly in subdivison (b) of section 1. The only thing that is added is "information" (and "code book" and "signal book"). Therefore, to give the word "information" as there used

any meaning except one which is invalid because of broad and undefined inclusiveness, and to give it the only meaning consistent with an intent on the part of Congress to create a valid statute, *the "information" referred to therein must specifically refer back to the well-circumscribed use of that term as it appears in subdivision (a) of section 1 and in section 6—that is, referring specifically to the places and things described and set forth either by Congress, itself, or by Presidential proclamation made known to the world.*

Attention is further called to the very definite and limited meaning given the word "information" and the phrase "information relating to the public defense" occurring in subdivision (b) of Section 2. The part of Section 2 under which the prosecution in this case was had, covers espionage activities concernings nations with whom the United States is at peace. In other words, *friendly* nations as opposed to *enemy* nations. Subdivision (b) deals with prosecution in a civil court of espionage "in time of war, with intent that the same (information specifically described in the Act) shall be communicated to the enemy."

Subdivision (b) reads as follows:

> "(b) whoever, in time of war, with intent that the same shall be communicated to the enemy, shall collect, record, publish, or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the armed forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operation, or with

respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for not more than thirty years." (50 U. S. C. section 32).

Certainly this specific section of the statute which has to do with those vital activities of the army and navy *when the nation is at war*, cannot be said to have more general or inclusive meaning when used in the first subdivisions of Section 2. It will be noted that there is a specific limitation of meaning placed by the statute upon the term "information relating to the public defense" which is made the subject of the wartime statute, namely that it must be such that it "might be useful to the enemy." This indicates again that in subdivisions (a), the meaning of the words "information" and "information relating to the national defense" must be restricted to the specific places and things enumerated in Section 1.

The inclusion of the Espionage Act in the War Code, by congressional action (Table 50 U. S. C. Section 31-42), the use of the term "national defense" in a military sense throughout the act, all show the intent of the Congress to give the terms "connected with national defense" and "relating to national defense" a military connotation and to limit their application to the places and things specifically listed in Section 1. The rule of *ejusdem generis* should be applied.

19 *Corpus Juris* 1255; *Church of the Holy Trinity* v. *United States*; 143 U. S. 457, 46 L Ed. 226 (1892);

United States v. *Katz*, 271 U. S. 354, 146 S. Ct. 513, 70 L. Ed. 986 (1926);
Goodall v. *Graham*, 35 Fed. (2d) 586 (9th C. C. A., 1929), (judgment affirmed 282 U. S. 409, 51 Sup. Ct. 186, 75 L. Ed. 415 (1931));
Carter v. *Liquid Carbonic Pacific Corporation*, 97 Fed. (2d) 1 (9th C. C. A., 1938);
Ex parte Hall, 1 Pick (Mass.) 261 (1821);
Pampanga Sugar Mills v. *Trinidad*, 279 U. S. 211, 73 L. Ed. 665 (1929);
Hodgson v. *Mountain and Gulf Oil Co.*, 297 Fed. 269 (D. C. Wyo., 1924);
Goldsmith v. *United States*, 42 Fed. (2d) 133 (2nd C. C. A., 1930.)

We submit that in attempting to interpret the statute from the point of view of relation of words and grammatical construction and context, one is forced to the conclusion that Congress used the word "information," with due regard for constitutional limitations, and so with particular reference to the matter and things and places specifically described in the statute.

(c) The construction placed on the Espionage Act by the lower courts would render it unconstitutional. The opinion of the Circuit Court of Appeals concedes the doubtful constitutionality of its construction of the Act:

Any construction of Sections 1, 2 and 4 of the Espionage Act, except that giving it a limited meaning restricting the term national defense to an application to the military and naval places and things identified, would render the statutes unconstitutional and void

as in contravention of Amendments V and VI of the United States Constitution. Otherwise the language of the Act would fix no immutable standard of guilt to govern conduct and would give no fixed and definite meaning as required of the language of a criminal statute, but would be subject to definition as to meaning by each court and jury.

Among the leading cases in the United States on this subject which lay down certain general rules which have been universally cited and applied are the decisions of the Supreme Court under the Lever Act found in *United States* v. *Cohen Grocery Company and related cases*, 255 U. S. 81, 65 L. Ed. 516 (1920). These cases arose under a wartime statute (adopted in 1917) making it unlawful to "make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." The following language of the District Court was quoted and approved by Chief Justice White:

> "Holding that this latter result was not the case as to the particular provisions of the Fifth and Sixth Amendments which it had under consideration, that is, as to the prohibitions which those amendments imposed upon *Congress against delegating legislative power to courts and juries, against penalizing indefinite acts, and* against depriving the citizen of the accusation against him, the court, giving effect to the right to be informed of the nature and cause of the amendments in question, came to consider the grounds of demurrer relating to those subjects. In doing so and referring to an opinion previously expressed by it in charging a jury, the court said:

Congress alone has power to define crimes against the United States. This power cannot be delegated either to the courts or to the juries of this country . . .

"Therefore, because the law is *vague, indefinite, and uncertain and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained.*"

The indictment was therefore quashed.

The Supreme Court said further:

"The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words 'That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an *ascertainable standard of guilt* and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore,

the widest conceivable inquiry the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to *carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.* And that this is not a mere abstraction finds abundant demonstration in the cases now before us; since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed."

In the same case certain language used by the lower Court is probably more descriptive of the problem of appellant herein than any other ever written, and therefore is cited in amplification. In 254 Fed. 218, at p. 223, the District Judge said:

"No man would engage in business, and no self-respecting man would remain in business, if his fortune, good name, or liberty is to be determined solely by the heated and prejudiced views of what is unjust and unreasonable, which may be entertained by a jury personally embarrassed and harassed, it may be, by the inordinate rise in prices of all commodities. Such a law may be fit for the trial of the guilty; but laws ought to be fit both to try the guilty and the innocent. A law which is fit only to try those who are guilty necessarily begs

the question of guilt, and is therefore no better than lynch law.

"The definitions, boundaries, and limits of a criminal statute ought, at least, to be so clear that no man in his right mind can be in doubt when he is violating and when he is not violating such statute. There ought not to be necessary any chopping of logic or intricate reasoning from cause to effect in order to decide the question of criminality."

"Neither is justification for the indefiniteness and uncertainty which inhere in the statute under discussion to be found in any alleged necessity to mitigate a present and crying evil, which all right thinking men must deprecate and abhor; for it would seem that it might simply have been declared that a sale of any necessary for a stated percentage increase in price beyond cost and carriage should be a punishable crime. At least, such a law would not be objectionable on the ground here urged. That it would have been arbitrary may be conceded. But the statute here is just as arbitrary and to its arbitrariness is added an indefiniteness, vagueness, and uncertainty which is dangerous, beyond excusing, to the property and liberty of innocent men."

The most recent case where the United States Supreme Court has given consideration to the rule of certainty required in criminal statutes, is that of *Lanzetta* v. *New Jersey*, 306 U. S. 451, 83 L. Ed. Ad. Op. 590 (decided March, 1939). This was an appeal by defendants from a judgment of the Court of Errors and Appeals of the State of New Jersey affirming a judgment of the Supreme Court which affirmed convictions in the Court of Quarter Sessions of Cape May

County of violating a state statute making it a crime for a person not engaged in any lawful occupation, who has been previously convicted of crime or disorderly conduct, to be a known member of any gang. In reversing, the Supreme Court said:

"If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. *Cf.* United States v. Reese, 92 U. S. 214, 23 L. ed. 563, 565; Czarra v. Medical Supers, 25 App. D. C. 443, 453. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Stromberg v. California, 283 U. S. 359, 368, 75 L. ed. 1117, 1122, 51 S. Ct. 532, 73 A. L. R. 1484; Lovell v. Griffin, 303 U. S. 444, 82 L. ed. 949, 58 S. Ct. 666. *No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.* All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Constr. Co., 269 U. S. 385, 391, 70 L. ed. 322, 328, 46 S. Ct. 126: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. *And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.*'"

In the case of *General Construction Company* v. *Connally*, 3 Fed. (2d) 666, where the Court construed an Oklahoma statute for the payment on state work of wages of "not less than the current rate of per diem wages in locality where the work is performed," the law was held unconstitutional. The following language is pertinent:

> "There is a clear distinction between an indefinite civil statute and an indefinite criminal statute. This distinction has been recognized by the Supreme Court of the United States. In *Edgar A. Levy Leasing Company* v. *Siegel*, 258 U. S. 242, an indefinite state statute was upheld it being civil; while *International Harvester Company of America* v. *Commonwealth of Kentucky*, 234 U. S. 216, a penal or criminal statute of Kentucky was held unconstitutional because of its indefiniteness. The basis for this distinction is evident. . . .
>
> "The authorities support the rule that a statute creating an offense must use language which will convey to the average mind information as to the act or fact which it is intended to make criminal."

When this well-considered case was reviewed on appeal, Mr. Justice Sutherland said (269 U. S. 383, 70 L. Ed. 322 (1926)):

> "We are of the opinion that this provision presents a double uncertainty, fatal to its validity as a criminal statute . . . To construe the phrase 'current rate of wages' as meaning either the lowest rate or the highest rate or any intermediate rate, or, if it were possible to determine the various

factors to be considered, an average of all rates, would be as likely to defeat the purpose of the legislature as to promote it. . . .

"In the second place additional obscurity is imparted to the statute by the use of the qualifying word 'locality.' Who can say with any degree of accuracy, what areas constitute the locality where a given piece of work is being done?"

United States v. *Reese*, 92 U. S. 214, 23 L. Ed. 563 (1876), involving the question of suffrage under the Fifteenth Amendment in a state election in 1870, is probably the case most often cited:

"This is a penal statute, and must be construed strictly, not so strictly indeed, as to defeat the intention of Congress, but the words employed must be understood in the sense they were obviously used. *The United States* v. *Wiltberger*, 5 Wheat. 85 . . . Laws which prohibit the doing of things and provide a punishment for their violation should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute he may be subjected to a prosecution for a false oath; and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion . . . *If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime.*"

In another old but well recognized authority, *United States v. Sharp, et al.*, Fed. Cas. No. 16264, in defining what constituted a "revolt" on board a ship, the Court said:

> "If we resort to definitions given by philologists, they are so multifarious, and so different, that I cannot avoid feeling a natural repugnance to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a capital nature; when, by making a different selection, it would be no crime at all, or certainly not the crime intended by the legislature. *Laws which create crimes ought to be so explicit in themselves, or by reference to some other standard, that all men subject to their penalties, may know what acts it is their duty to avoid.* For these reasons, the Court will not recommend to the jury, to find the prisoners guilty of making or endeavoring to make a revolt, however strong the evidence may be."

In interpreting the words "real value" in *Collins v. Commonwealth of Kentucky*, 234 U. S. 634, 53 L. Ed. 1510 (1914), the present Chief Justice of the Supreme Court used these words:

> "It was found that the statute in its reference to 'real value' prescribed no standard of conduct that it was possible to know; that it violated the fundamental principles of justice embraced in the conception of due process of law in compelling men on peril of indictment to guess what their goods would have brought under other conditions not ascertainable."

In *U. S.* v. *Shreveport Grain & Elevator Co.*, 46 Fed. (2d) 354, on a charge for selling underweight packages under misbranding of food products, the statute was held unconstitutional as too indefinite. The Court said:

"It must be remembered that this is a criminal action for the alleged violation of this statute, one of the very few that have been brought thereunder . . . Hence a much stricter construction is required than if it were merely an act affecting civil rights. I have no doubt that Congress has the power for the protection of the public to require that packages containing articles of food shall have stamped thereon the correct weight, and that the dealer without having any fraudulent or criminal purpose, may in an extensive business be unable to comply exactly in each instance with this requirement. However, in such circumstances it would be a question of intent for the Court and jury, if there was a variation, but the dealer would have a fixed standard by which to be guided, whereas, *under the quoted provision of the act, its violation, in large measure, is left either to the discretion of the enforcing department, or to the judgment of the Court and jury in each instance as to what is reasonable. This might vary according to the views of the particular tribunal, and the dealer could never know whether he was violating the law or not until he was brought into court.*

"For these reasons, I believe the asserted ground of unconstitutionality under the Sixth Amendment is well founded." (Citing *Cohen* and *Connally* cases, *supra.*)

The *Shreveport* case was reversed in 287 U. S. 77, 77 L. Ed. 175 (1932), not for the reason that the Court found that the complained of language was definite, but because they held that the act, in addition, had created powers in certain commissions to alter the arbitrary rule, a consideration that cannot apply in the instant case, as this is general criminal language, applicable to every type and kind of act. The Court, however, makes one comment of interest in that case on the subject of the effect of legislative purpose as reported in discovering the meaning of a statute:

> "In proper cases such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. But they cannot be resorted to for the purpose of construing the statute contrary to the natural import of its term. *R. R. Com.* v. *Chicago B. & G. R. R. Co.*, 257 U. S. 563; *Penn. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184; *George Van Camp & Son* v. *American Can Co.*, 278 U. S. 245, 60 A. L. R. 1060. Like other extrinsic aids to construction, their use is 'to solve, but not to create, an ambiguity.' *Hamilton* v. *Rathbone*, 175 U. S. 414, etc."

To the same effect:

Herndon v. *Lowery*, 301 U. S. 242, 81 L. Ed. 1066 (1937);
U. S. v. *Brewer*, 139 U. S. 278, 35 L. Ed. 190 (1891);
International Harvester Co. of America v. *Ky.*, 234 U. S. 216, 58 L. Ed. 1284 (1914);

United States v. *Pennsylvania R. R. Co.*, 242 U. S. 208, 61 L. Ed. 251 (1916);
Oklahoma Operating Co. v. *Love*, 251 U. S. 331, 64 L. Ed. 596 (1920).

It clearly appears, therefore, that to construe the statutes in question other than to give them the limited meaning for which appellant contends, would be to render the Espionage Act unconstitutional and void. This construction is wholly untenable.

(d) Under strict construction of the Espionage Act, which is the necessary construction to be given to a penal statute and particularly to language creating a crime, the petitioners were convicted of a crime not defined by the Act.

In the case of *Braffith* v. *People of Virgin Islands*, 26 Fed (2d) 646 (1928), in construing a statute relative to right of appeal upon plea of guilty, the Court said:

> "When the language of a statute is plain and unambiguous and it conveys a clear and definite meaning, there is not occasion to construe it and *no justification for enforcing it otherwise than in accordance with its plain meaning*. When, however, a statute is ambiguous in its terms, or because of doubtful language it would seem to have two meanings, courts are called upon to construe it by finding which meaning reflects the intention of the legislature that enacted it . . . Rules of construction, however, distinguish between civil and penal statutes; the former may be construed liberally; *the latter must be construed strictly*. . . The rule has long been settled in similar jurisdictions that all such (penal) statutes must be construed strictly

against the state and favorably to the liberty of the citizen. . . Penal statutes will not be construed to include anything beyond their *letter even though within their spirit;* nothing can be added to them and nothing can be taken away from them by inference or intendment."

So, also, in the case of *State* v. *Fero Bottling Works Company,* 124 N. W. 387, 26 L. R. A. N. S. 872 (N. D. Sup. Ct., 1910), the Court said:

"In our construction of this statute in all its parts we bear in mind that it is a penal statute; that nothing is to be regarded as included within those provisions that are not within its letter as well as within its spirit; and that if it contains patent ambiguity and admits of *two reasonable and contradictory constructions, that which operates in favor of a party accused under its provisions is to be preferred.*"

In the case of *First National Bank* v. *United States,* 206 Fed. 374, 46 L. R. A. N. S. 1139 (8th C. C. A., 1913), the Court said:

"A person who, or an act which, is not, by the express terms of the law, clearly within the class of persons, or within the class of acts that it denounces, will not sustain a conviction thereunder . . . An act which is not clearly an offense by the express will of the legislative department before it was done, may not lawfully or justly be made so by construction after it was committed either by the interpolations of expression or by the expunging of some of its words by the judiciary . . .

It would be dangerous indeed to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because of its equal atrocity or of kindred character with those that are enumerated." (Italics ours.)

In the case of *Sutherland* v. *Commonwealth of Virginia*, 65 S. E. 15, 23 L. R. A. N. S. 172 (Va. Sup. Ct. of App. 1909), the defendant was accused of unlawfully carrying about his person a pistol which was concealed from common observation. Evidence showed that the accused had placed his pistol, encased in a scabbard, in a pair of saddle bags which were closed and which he was carrying in his hand at the time of his arrest. The question presented was whether or not it was a violation of the statute against carrying concealed weapons for a man to carry in his hand a pair of saddle bags containing a pistol encased in a scabbard which is hidden from common observation. The Court said:

"No man incurs a penalty unless the act which subjects him to it is clearly within the spirit and letter of the statute which imposes such penalty. *There can be no constructive offense and before a man can be punished his case must be plainly and unmistakably within the statute.* If these principles are violated the fate of the accused is determined by the arbitrary discretions of the judges and not by the express authority of the law. If the statute be less comprehensive than the legislature intended, it is for that body to extend its operations and not for the courts."

A strict construction of the terms "connected with" or "relating to the national defense" in this case will limit the application of these terms to the matters, places and things enumerated in Section 1, as to which, admittedly the petitioner-defendants were guilty of no offense.

"None of the reports contained any information regarding the army, the navy, any part thereof, their equipment, munitions, supplies or aircraft *or anything pertaining thereto.*" Opinion of Circuit Court of Appeals in Gorin v. U. S. 111 F. 2d 712, 716.

POINT II

The information revealed by petitioners was so "innocuous" (as described by the Circuit Court of Appeals) that the revelation could not be "to the injury of the United States or to the advantage of any foreign nation" as required by the statute; and since "none of the reports contained any information regarding the army, the navy, any part thereof, their equipment, munitions, supplies, or aircraft or anything pertaining thereto" (again quoting the Circuit Court of Appeals), there should have been a directed verdict of acquittal.

A detailed analysis of these reports will fully support this conclusion and such an analysis is presented in Appendix B.

In the trial appropriate objections were made to the introduction of these reports and overruled; demurrers to the indictment were made and overruled; motions to dismiss and for a directed verdict, motions in arrest of judgment and for a new trial, were made and denied, appropriate assignments of error were made in the Circuit Court of Appeals as indicated in

the specifications of error made in this court. The errors responsible for the convictions of petitioners have been properly and completely assigned and an adequate record made for their review—as to which there is dispute. The legality of the convictions depends on the construction to be placed on the Espionage Act and upon our contention that the evidence upon which the government relied (evidence that certain reports were obtained by Gorin from Salich) did not prove the commission of a crime punishable under either a natural construction or a constitutional construction of the Espionage Act.

An examination of the reports will demonstrate their "innocuous" character—as conceded by the Circuit Court of Appeals. It will also demonstrate that they contained no information relating to military establishments, armaments, places or things, the revelation of which was prohibited by the Espionage Act. It will also demonstrate that petitioners had no "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation"—the intent required (in the language just quoted) by both Sections 1 and 2 of the Act.

The trial court instructed the jury that if petitioners had "reason to believe" that the information would be to the *advantage* of a foreign nation, even though not to the *injury* of the United States, that would constitute the necessary intent (Assignment of Error XLVII; R. 677). The court *refused* to instruct the jury that

"advantage" to a foreign nation must mean "advantage" *against* the United States—and not merely advantage against some other foreign nation (Assignment of Error LII; R. 686).

We submit that this statute *of* the United States cannot be properly construed to make it a crime *against* the United States to do an act not injurious *to* the United States or its citizens. The "advantage" of a foreign nation referred to in the Act must clearly connote an advantage over or against the United States. The instructions of the trial court, approved on appeal, defined the necessary criminal intent contrary to the plain meaning of the definition incorporated in the Espionage Act and made the statutory definition meaningless. Obviously, no one would seek information for a foreign government without assuming that the information would be of some advantage or benefit to the foreign nation. But if no injury or disadvantage to the United States were intended (or, as here, resulted) for what reason would the United States seek to inflict a heavy punishment on persons intending and doing no harm to the United States?

We submit that these instructions of the trial court, misconstruing the statute, were largely responsible for the conviction of the defendants, by depriving them of a defense expressly provided in the statute itself. There should have been a directed verdict of acquittal because of lack of evidence of either intent to disclose, or the disclosure of, information in violation of the Espionage Act. (See Appendix B for a detailed analysis of the reports.)

POINT III

The District Court erred in its instructions to the jury and the Circuit Court of Appeals failed to correct such errors, particularly in: (a) instructions construing the provisions of the Espionage Act and leaving it to the jury to define an offense and to fix the standard of guilt; and (b) failure to instruct the jury to acquit Gorin and Salich on the conspiracy count of the indictment after the jury had found the defendant, Natasha Gorin, not guilty on that count.

As to (a), the Circuit Court of Appeals held that whether information related to the national defense or not was a question of fact to be decided by the jury, a construction of law which we submit would make this provision of the Espionage Act unconstitutional.

As to (b), the Circuit Court of Appeals indicated that the court might have erred, but since the sentences on all three counts of the indictment ran concurrently, it was immaterial whether the conviction of present petitioners on the third count was right or wrong.

Although, insisting that the trial court erred in failing to direct a verdict of acquittal on the third count, we confine our argument to the more vital error of the trial court in its instructions which left it to the jury to define the offense of which the petitioners were then found guilty.

First: As a matter of law under a proper interpretation of the Espionage Act none of the reports admitted into evidence constitute information relating to, nor were these notes or documents connected with, the national defense; and the Court should have so instructed the jury.

An apt illustration of the duty of a trial court, and a holding applicable in this case, is contained in the case of *United States v. Dennett*, 39 F. (2d) 564 (2 C. C. A. 1930) where there was an appeal from the conviction of the defendant for mailing obscene matter in violation of the criminal code section. (18 U. S. C. 334.) The facts showed defendant had written a pamphlet entitled "The Sex Side of Life" which was designed for the use of parents in teaching the facts of life to their children. The pamphlet had been endorsed by physicians, medical groups and educational authorities. The Circuit Court of Appeals reversed on the grounds that as a matter of law the pamphlet could not come within the ban of the statute. In discussing whether or not this pamphlet came within the prohibitions of the act, the court said:

> "But the important consideration in this case is not the correctness of the rulings of the Trial Judge as to the admission of evidence, but the meaning and scope of those words in the statute which prohibited the mailing of an 'obscene, lewd or lascivious . . . pamphlet'. It was for the trial court to determine whether the pamphlet could reasonably be thought to be of such a character *before submitting any question of the violation of the statute to the jury* (citing cases) and the test most frequently laid down seems to have been whether it would tend to deprave the morals of those into whose hands the publication might fall by suggesting lewd thoughts and exciting sensual desires."

Second: The form of instruction left to the speculation of the jury whether or not the reports related to the national defense, giving a construction of the

statute so broad as to render it indefinite and uncertain and therefore invalid under the Amendments V and VI of the Federal Constitution.[1]

The point is fully developed heretofore that a statute must be given a construction which is certain, and if given a construction which renders it uncertain and leaves its meaning to the speculation of a jury, such construction renders it void and unconstitutional. No other conclusion can be drawn but that the jury in considering any given report was required to speculate and conjecture as to how it could possibly be related to the national defense. For instance (selecting at random Government's exhibit No. 6 g), report No. 534 (R. 277) reads:

"17 June 1938

"534

"Memo for DIO

Subject: Nakamoto, George H. - Column in Refu Shimpo by subject appearing on 15 June 1938. 1. Mr. Nakamoto, the writer of the 'Off the Record' column of the Rafu Shimpo, has been very pro-Japanese and anti-American of late.

H. deB. Claiborne."

Such a report, together with others of a like nature were permitted to go to the jury with an instruction of the Court reading in part as follows:

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[1] The right to "due process of law (Fifth Amendment), and the right of an accused "to be informed of the nature and cause of the accusation" (Sixth Amendment), are so obviously involved that no further exposition or citations of constitutional law seem necessary.

"You are instructed that the term 'national defense' includes all matters directly and reasonably connected with the defense of our nation against its enemies (R. 430). . . Whether or not the information, obtained by any defendant in this case, concerned, regarded or was connected with the national defense is a question of fact solely for the determination of this jury, under these instructions" (R. 434).

It is evident that the jury was thus guided into a realm of pure speculation. Such reports as the one just quoted—except by some imaginary and conjectural meaning arbitrarily given—cannot possibly be said to have any reference to the places, things or instruments of war or documents relating thereto, even as those terms were broadened and amplified by the coincident instructions of the Court.

Even if the term "national defense" had a well-defined and circumscribed meaning—which it certainly has not—when there is added to it the further broadening phrases "relating to", and "connected with", the result is a most vague and an almost limitless definition. The guilt of a defendant charged with the offense of disclosing information "relating to the national defense" is determined simply by the speculation and conjecture of a particular judge or jury. Such language when unlimited in application is far more vague and uncertain than the language used and condemned in the Lever Act and in other cases heretofore quoted.

Some standard, fixed and definite, must be provided to govern the conduct of both the innocent and guilty in a statute defining a crime. Particularly should this be true in this case when the news of war, invasion and

aggression are before men every day; and when espionage, reports and rumors of espionage and tales, both true and fanciful, are currently presented by newspapers periodicals, radio and motion pictures. No such conjectural meaning should have been read into the statute. It should have been given the fixed and certain meaning contended for by petitioners and presented by their requested instructions.

The term "national defense" is descriptive of the most expansive concept, particularly in these days of "total wars" and "total defense". There is hardly a phase of business, commerce, or the life of our people as a whole, which is not impressed with some relation to national defense. The language of the day, in the press, over the radio and in private conversation is charged with reference to this all important problem. Legislation and state papers use the term—*all with the largest and most inclusive meaning which truly encompasses the widest concept of our individual and collective life and activities.*

Third: If the instructions had been construed as partially adopting the meaning of the Act urged by petitioners below (namely, a limited use of the term "national defense" restricted to those places and things specifically described in the statute) then the reports should have been held not to relate thereto, and under the law so given, there was no evidence before the jury upon which to convict.

The Court in its charge may be said by the Government to have accepted such an interpretation as contended for by petitioners; and in part of the instructions

seems to have ruled definitely that the list of things and places in the act is controlling. In defining the term "relating to the National defense", the Court defined the first line of defense as well as the second line of defense and stated that the statute names the "places and things" connected with or which comprise both the first and secondary lines of defense and specifically charged that "all of which are specifically designated in the statute" (R. 341).

The Court further charged that "for purposes of prosecution under these statutes, the information, documents, plans, maps, etc., connected with *these places or things* must directly relate to the efficiency and effectiveness of the operation of *said places or things* as instruments for defending our nation" (R. 433). The charge refers to other matters of defense, in each case connecting the same with the phrase "said places or things." Notwithstanding the language thus used, the *District Judge in further continuing his definition generalizes beyond all exact or definite meaning.* He winds up his definition by stating that "you are then to remember that the information, documents or notes which are alleged to have been connected with the national defense, may relate or pertain to the usefulness, efficiency or availability *of any of the above places, instrumentalities or things* for the defense of the United State of America. The connection must not be a strained one or an arbitrary one. The relationship must be reasonable and direct."

The Court concluded by stating that, whether the information was connected with the national defense "is

a question of fact solely for the determination of this jury, under these instructions." In other words, unless the charge were construed to limit national defense strictly to the things and places defined in the statute and referred to by the Court, *then the Court permitted the jury to reach its own conclusions as to what might be included in the phrase "national defense"*. On the other hand, if the instructions were intended to permit the jury to include within national defense only the places and things referred to in Section 1, and the charge of the Court was intended thus to limit the jury, then the Court's charge should have unequivocally supported the contention of the defendants that only those things can be included within the scope of the phrase "relating to the national defense" *as relate to or concern the list of twenty-five things or places defined and identified in Section 1*. But such a charge clearly made would have been practically equivalent to a directed verdict of acquittal. This was obviously not the effect of the charge.

It should be evident that the total effect of the instructions was to leave the jury without any clear understanding of the law; but to leave the jury also finally impressed with the idea that the entire question of what constituted an offense, as well as whether defendants were guilty of committing it, was a question of fact to be determined by the jury. This conclusion becomes inevitable when it is realized that if the law had been properly construed by the trial court it would have either directed an acquittal or, on a motion for a new trial, would have set aside verdicts which, on the undisputed evidence, could not be sustained.

Conclusion

We submit that, under a constitutional construction of the Espionage Act, consistent with the maintenance of due process of law, the petitioners were convicted of offenses not defined in that Act, or elsewhere in the statutes of the United States; and that the judgments against them should be reversed.

Respectfully submitted:
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APPENDIX A

DETAILED STATEMENT OF THE CASE

The indictment is in three counts. Each charged an alleged offense of violation of certain provisions of the "Espionage Act" appearing in the "War" code. (50 U. S. Code 31, 32 and 34, Sections 1, 2, and 4 of the Act of June 15, 1917.) Petitioners were convicted on all counts.

The first count of the indictment charged violation of Section 1 of the Espionage Act. It alleged that on or about September 15th, 1937, at Los Angeles, for the purpose of obtaining information respecting the national defense with intent and reason to believe that it was to be used to the injury of the U. S. and to the advantage of the U. S. S. R., the defendant obtained

> "instruments, documents, writings and notes of matters connected with the national defense, to-wit: confidential information, reports, instruments, documents and writings pertaining to and concerning various and numerous individuals under suspicion, observation, surveillance and investigation, belonging and contained in the United States Naval Intelligence files and reports at San Pedro, California, bearing identification Naval Intelligence Report numbers as follows: 435 . . ." (listing a total of 69 "reports.") (R. 3.)

The second count charged violation of Section 2 of the same Act. It alleged that defendants on or about September 15, 1937, with like intent and reason to believe, transmitted and delivered to the appellant Gorin as a citizen and representative of the U. S. S. R.

"various documents, writings, notes instruments and information relating to the national defense, to-wit: The confidential reports of the investigators of said United States Naval Intelligence located in the office of the United States Naval Intelligence at San Pedro, California, and pertaining to and concerning various and numerous individuals who have been and are under suspicion, observation, surveillance and investigation by said Naval Intelligence Report Numbers as follows: 435 . . ." (listing the same numbered "reports". (R. 4.).

The third count is based on Section 4 of the Act, which makes it an offense to conspire to violate Section 2. It charged a conspiracy, with certain overt acts alleged, to communicate and transmit to Gorin as a representative and citizen of the U. S. S. R.

"documents, writings, plans, notes instruments and information relating to the national defense, to wit: confidential reports, instruments, documents and writings contained in the files of the United States Naval Intelligence at San Pedro, California." (R. 6.)

Petitioners severally demurred upon the grounds that the indictment failed to state facts sufficient to constitute a public offense, or an offense under the Espionage Act, and that it was vague and uncertain and failed to identify or define the term "national defense" as used in the indictment, and was therefore insufficient and in violation of Amendments V and VI of the Constitution

of the U. S. (R. 11). The demurrers were overruled (R. 19), and a plea of not guilty entered. (R. 20.) The case was then tried before a jury, commencing February 21, 1939 (R. 68), and concluded with a verdict of guilty against petitioners on all three counts (R. 462). Gorin was sentenced to imprisonment for six years and to pay a fine of $10,000 (R. 35). Salich was sentenced to imprisonment for four years and to pay a fine of $10,000 (R. 37).

The Facts: Salich talked freely to Special Agent G. V. Dierst of the FBI. Dierst was a government witness (R. 145) and related at length the story told him by Salich. After this was reduced to note form it was corrected by Salich and introduced in evidence. (Govts. Ex. 4, R. 168.) Also Salich, at the office of the FBI, typed out and signed what he termed "my sincere and honest story as to what transpired during my relationship with Gorin." (Govt. Ex. 7, R. 178.)

Salich took the witness stand (R. 329 et seq.) and testified in substance practically to the same effect as related in these statements. There was some amplification of detail but no essential variance. Other facts in evidence corroborated Salich. Gorin did not testify.

Salich was born in Moscow, Russia. His parents were middle-class business people, who fought with the "white" forces, and who escaped from Russia, emigrating via Japan to the United States in 1923 (R. 329). After naturalization, he joined the police force at Berkeley, California, serving there under Police Chief August Vollmer from July 1, 1930 until August 15, 1936, as a patrolman, secretary to the Chief, and acting sergeant, with an excellent record in the department (R. 330, 382). He made application for employment with the Naval Intelligence about April or May of 1936, and

after appointment, reported for duty August 19, 1936. (R. 331.)

The Office of Naval Intelligence is a branch of service of the United States Navy. The head is the Director of Naval Intelligence, who acts under the Chief of Naval Operations in Washington, D. C. (R. 307). Work in Southern California is under the direction of the District Intelligence Officer of the Eleventh Naval District, stationed at San Diego, California. Commander Elias M. Zacharias was in charge at the time of the trial of the action (R. 223). There was a branch office at San Pedro, California. Lt. Commander J. J. Rochefort [1] was in charge of this office as Assistant Director until June 1, 1938, and was succeeded by Lt. H. di B. Claiborne [2] (R. 297).

Salich was employed at a salary as an investigator in the San Pedro office. His duties were to collect information or data about individuals under surveillance of the District Intelligence Officer of the Navy, and other information which might be of possible interest to the office or the commander in charge (R. 334, 224). He also was a stenographer and worked as a clerk in the San Pedro office for about a month (R. 335, 368). He was required to conceal his identity as an investigator for the Naval Intelligence, and carried a police badge as a Los Angeles Police Department officer (R. 366). In order to keep up on the work of the office and matters under investigation, he, and an investigator working with him, would go to the office at San Pedro and go over the copies of reports made by the commander to his su-

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[1] The name of "Rochefort" appears at some places in the record erroneously spelled as "Roachefort".

[2] The name of "Claiborne" at some places in the record erroneously spelled as "Clayborne".

perior at San Pedro, kept in the office desk of Chief Yeoman Hanna (R. 112, 335).

The personnel of the San Pedro office, in addition to the officer in charge, consisted of Chief Yeoman Roy Hanna, who was the office stenographer-secretary, and two investigators, Salich and one H. L. Stanley (R. 110). The latter was hired April 1, 1937 (R. 127). Salich and Stanley worked together and used an automobile and an apartment jointly in their work. They covered a specified territory (R. 128).

The method of operation of the office required the investigators to work under the instructions of the Assistant Director. An assignment was made to the investigators and they were required to carry it through in the best manner possible, according to their own judgment. Besides, the investigators were also to be on the lookout for any information which might be of interest to the office (R. 335). Reports were prepared by the investigators in longhand or typewriting and sometimes orally. Sometimes these reports would be written up outside the office and brought in. These investigators' reports were handed to the Assistant Director, who, in turn, evaluated the information they contained and dictated to Chief Yeoman Hanna a *report*, which sometimes was signed. These reports were then transcribed into typewriting, an original, four yellows and one green would be made. The original and three yellows were forwarded to San Diego. The green and one yellow were retained at San Pedro, the green being placed in the filing system and the yellow "onion skin" was kept in Hanna's desk for access by Salich and Stanley, who would check them when they came into the office. The investigators had keys to the office. The original investi-

gators' reports were destroyed by burning (R. 111, 112, 121, 123).

Gorin is a citizen of the U. S. S. R. and has a passport of that nation. Together with his wife Natasha (or Natalia) and small son, Gorin entered the United States through Ellis Island, January 10, 1936. His passage to the United States was paid by Intourist, Moscow, and he entered this country to act as a representative and director of the tourist business (Gov. Ex. No. 2, R. 214). He was employed by Intourist, Inc., a New York corporation, which maintains an office at Los Angeles and had charge of their office (R. 145).

Salich first met Gorin sometime in July or August, 1937, when he and Stanley called at the office of the Vice Consul of the U. S. S. R. in Los Angeles. They were acting on instructions in an attempt to secure information on a certain Soviet official by the name of Kaganovich. The conversation at that time was social and concerning Kaganovich (R. 333).

The next meeting with Gorin occurred early in January, 1938. A few days before Gorin had called and told Salich's wife he had a letter of introduction from a former Russian Vice Counsel by the name of Aliavdin (R. 336, 338, 178) whom Salich had known in San Francisco while on the Berkeley police force. In fact, he had told Aliavdin and some others prior to his employment by the office of Naval Intelligence of his application for such a position (R. 376, 379).

On the occasion of this first meeting, Salich went to Gorin's house, Aliavdin's letter was delivered (a social letter of introduction) and the two of them then went to a cocktail lounge in the vicinity. Here they conversed in Russian, and Gorin said they were interested in ob-

taining information about Japanese activities in this area; that they were quite friendly to the United States and wanted no information of any kind that would be considered against the interest of this country (R. 169, 178, 336). Gorin suggested he was prepared to pay some money for the information. Salich replied that he questioned whether any information to which he had access would be of value, and that it would be improper for him to accept money. Gorin explained that there was always a possibility that any information about Japanese international activities might be of assistance in the event of trouble between Japan and the Russians, but that Russia was friendly to the United States and did not want to do anything to jeopardize that relationship.

Salich the very next day discussed this conversation and the suggestions of Gorin with his colleague and co-investigator Stanley. *He reported it to his superior Lt. Commander Roachefort, Stanley being present* (R. 337, 340, 135). Salich relates that he was instructed to keep up his contacts with Gorin, exchange information with him, giving such as he could get in newspapers and magazines, and see what could be obtained in return (R. 337).

He next saw Gorin a few days later, when they had lunch at Perino's, a restaurant in Los Angeles. Gorin reiterated his desire to get information *as to Japanese activities.* There was another offer of financial assistance, either directly, or to cover any expenses incident to getting the information. *Gorin said they were not interested in anything pertaining to this country.* This conversation was reported to Rochefort who said to continue the contact with Gorin and determine his exact

proposition, and to take Stanley along. Stanley and Salich discussed the matter and agreed that if Stanley went along it would spoil the contact (R. 339, 340).

There was a hiatus of about a month and a half when Salich did not see Gorin (R. 342). Then about March of 1938 they met again. Gorin importuned for Japanese information, arguing it was for the mutual benefit of the two countries. Salich related at that time that he was having marital difficulties and was handicapped financially and Gorin again offered financial assistance. Salich accepted the offer, saying he would take it only as a loan to be repaid when he got straightened out. Gorin said this was all right. At this conversation Salich told Gorin of certain information he had obtained regarding a meeting of the Far-East Research Institute where certain anti-American and anti-Semitic utterances were made. About two weeks later Gorin delivered $200 to Salich (R. 344, 362).

From time to time thereafter Salich met Gorin and furnished him certain information which came in part from the files and data of the Naval Intelligence. At no time did he give Gorin any actual files or reports. He either gave the information orally or in the form of notes made on his own typewriter (R. 351, 161). When apprehended by Mr. Dierst of the F.B.I., Salich went over the files of the Naval Intelligence with him and related in detail just what information he had turned over to Gorin. This appears in the testimony of Mr. Dierst (R. 153 et seq.) and the notes of Salich's statement as corrected by him (Govt. Ex. 4, R. 168).

The reports themselves, information as to which was given by Salich to Gorin or which they discussed together, can be divided generally into several inclusive categories.

First: Reports concerning movements and activities of certain Japanese persons in this country, including civilians, military and naval officers, diplomatic and consular attaches, and civil and commercial representatives, some of whom were apparently suspected of espionage within the U. S.

Second: Report regarding Japanese activities outside the U. S., principally in Mexico and Mexican waters.

Third: Reports concerning certain alleged communists in the U. S., whose activities were discussed.

There were no reports of any kind which in any way concerned or had any reference to the U. S. navy or army or any part of the naval or military establishment, or any place connected therewith, or of anything whatever relating to the functioning, or means of functioning, of the army or navy, or any of the proscribed places or things specified in Section 31, Title 50, U. S. C.

The evidence shows conclusively that at no time during the relationship did Gorin even attempt to obtain any information concerning the army or navy of the U. S., or of any place relating thereto. On the contrary, it is clear that at all times *Gorin only wanted information relative to Japanese and their activities*, and wanted to do nothing to in any way injure the U. S. or which would jeopardize the friendly relationship between the U. S. and U. S. S. R. (R. 169 170, 178, 198, 213, 337, 399, 342, 345, 356, 378). Not only is the testimony of Salich uncontradicted in this respect, but it is corroborated by the type and character of information contained in the reports, and the further fact

that there is no showing of any other information to which Salich had access. He specifically stated that at no time was he ever in a position to obtain any information of a secret nature about the U. S. navy, secret armament, air craft plans, or the like (R. 182).

The record shows that Salich promptly reported his first and certain other contacts with Gorin to his superior, Lt. Commander Rochefort (R. 172, 371). Gorin's "proposition" was discussed, and continued contacts were authorized (R. 370). Stanley, Salich's co-worker in the intelligence work, knew of these because many telephone conversations were had between Salich and Gorin (in the Russian language) while Stanley was present (R. 136, 347). Certain information concerning Kaganovich, Shumovsky and others was obtained by Salich from Gorin, which was reported to his office, concerning certain Russians in the U. S. (R. 333, 341, 347, 355, 377). There were also discussions from time to time relative to certain alleged communists under investigation by the Office of Naval Intelligence. *The invariable answer of Gorin was that he had no knowledge of communists in this country, had no connection with them and wanted none* (R. 354, 356).

The testimony shows that during the time information was being furnished by Salich, Gorin objected to its insufficiency, claiming there was more information which should be available concerning the Japanese and the real Japanese spies, and that his superiors complained that it was valueless (R. 171, 181, 349, 363). The reports to which Salich had access, and the information he divulged from them were aptly described as "inconsequential."

From time to time following the receipt of the first

money, Salich got various sums from Gorin. Usually it was in $200 amounts, but the increased pinch of closing a property settlement agreement with his wife occasioned a $500 amount. All in all, he received $1700, over a period from March to December 10, 1938 (R. 350, 360). Salich stated that he regarded these amounts as a loan and intended to repay Gorin as soon as his domestic and financial difficulties were strainghtened out (R. 181, 351). He never informed his superiors, Lt. Commander Rochefort or Claiborne that he was receiving money from Gorin (R. 377).

As stated above, Salich was taken to the office of the FBI by Mr. Dierst on December 10, 1938. He talked freely on the subject of his relationship with Gorin (R. 146, et seq.). He stated then, and later to Mr. Hanson, agent in charge of the FBI, that the information he had turned over to Gorin, and whatever he had done in dealing with him, was in no way prejudicial to the U. S., and that it was not in violation of the Espionage Act, with which he seemed to be familiar. In fact, he felt it might definitely be of advantage to the U. S. (R. 147, 170, 180, 181, 182). He explained the irregularity of his action by his firm belief in the fact that he was not in any way injuring the U. S., and the further fact that the pressure of his domestic difficulties made him especially desirous of obtaining money to settle with his wife (R. 170, 182, 343, 359).

Upon the trial, there testified certain of the Navy personnel including Roy Hanna, Chief Yeoman, an enlisted man who acted at San Pedro as the office secretary, Commander Elias M. Zacharias, District Intelligence Officer for the Eleventh Naval District, Lt. Commander Claiborne, Assistant Intelligence Officer in

charge of the office at San Pedro, Lieutenant William S. Maxwell, of Russian origin, and H. L. Stanley, investigator employed with Salich as related above. Lt. Commander Rochefort, who had been the superior of Salich during the times of the original and early contacts with Gorin, did not testify.

APPENDIX B

DETAILED ANALYSIS OF REPORTS

Shows Clearly That None of Them Concern the Places or Things, or Could be Construed to Come Within the Meaning of the Espionage Act.

There were introduced in evidence by the Government, a total of forty-three "reports", referred to in the indictment, and the basis for the claim that "information relating to the national defense" was obtained and transmitted by the petitioners for purposes in violation of the statute. The whole of the reports are set forth in the record (R. 259-295, inclusive). Appropriate assignments of error were made by both Gorin (R. 641-667) and Salich (R. 567-695). A detailed summary of the reports, listed under their respective categories follows:

First: Reports Concerning Movements and Activities of Japanese Persons in This Country.

These reports included civilians, military and naval officers, diplomatic and consular attaches, and civil or commercial representatives, some of whom were apparently suspected of espionage activities. A review of their subject matter and character follows, considering them sequentially as they appear as exhibits and assignments of error.

Report No. 548 (R. 274), Govts. Ex. 6 (c).

This report refers to a "subject", a Japanese, the fact that he is an agent for some Japanese firm or agency, that he keeps a permanent room at the Olympic Hotel

which he rarely uses, that he drives a nice car, is well dressed, seems to always have money and is always on what he calls fishing trips.

Report No. 546 (R. 275), Govts. Ex. 6 (d).

This report deals with an individual Japanese and the fact that he left Los Angeles for San Francisco the morning of June 21st and that San Francisco was informed of his departure. Also that he is scheduled to sail on the Chichibu Maru on June 22nd. Also that "San Francisco was informed" that he had written a large air mail letter to the Clerk of a San Francisco hotel.

Report No. 535 (R. 276), Govts. Ex. 6 (e).

This report apparently is supplementary to a prior one and reports that individual Japanese to whom it refers is manager of a club in Vallejo.

Report No. 534 (R. 277), Govts. Ex. 6 (g).

This report concerns three Japanese named and merely reports that one is expected in Los Angeles on June 19th, the second arrived by plane from Mexico City on June 16th and the third arrived by train from Mexico on June 16th.

Report No. 532 (R. 277), Govts. Ex. 6 (h).

This report concerns the writer of the "Off the Record" column of the Rafu Shimpo (a Los Angeles daily language newspaper): "has been very pro-Japanese and anti-American of late."

Report No. 530 (R. 277), Govts. Ex. 6 (i).

This report refers to two officers of the "Imperial Japanese Army" and the fact that one of them left Los Angeles for San Francisco on the Daylight Limited on June 16th and would catch the Chichibu Maru for Japan. Also that there was no further information on the other officer since a report of an earlier date.

Report No. 529 (R. 278), Govts. Ex. 6 (j).

This report concerns two Japanese representing an oil company of Japan, one being a chemical engineer and the other a mechanical engineer, both arriving in Los Angeles on March 10, 1938.

Report No. 528 (R. 278), Govts. Ex. 6 (k).

This report concerns the activity of a Japanese doctor who had been seen driving an "eggshell blue Cadillac sedan with California License No.," and that fact that he made a trip to Northern California the first part of June and took 300 feet of film of the Bay area and the Coast on the way up. His address is given and the fact that he has an extensive practice among the Japanese on Terminal Island. The fact is also mentioned that the film had been previewed by "this office *and contains nothing of military importance.*"

Report No. 525 (R. 279), Govts. Ex. 6 (l).

This report concerns two officers of the "Imperial Japanese Navy" and the fact that on June 15th they left on an automobile trip to Yosemite via San Fran-

cisco. Also that they would be driving a Chevrolet coach with a Washington, D. C. license.

Report No. 519 (R. 280), Govts. Ex. 6 (m).

This report concerns the arrival of a colonel of the Imperial Japanese Army who arrived in Los Angeles June 14th on the Chief. Also the further fact that another Japanese officer did not arrive with him, and that the individual reported on was at the Olympic Hotel, but had made no reservations and was not registered.

Report No. 514 (R. p. 280), Govts. Ex. 6 (n).

This report concerns an individual Japanese who was staying at the Ambassador Hotel and at the residence of the representative of the Japanese steamship line and that he is leaving for New York on the Chief and plans to continue to South America for business contacts.

Report No. 507 (R. 281), Govts. Ex. 6 (o).

This report concerns a number of Japanese "frequently seen in Li'L Tokyo, Los Angeles, both together and separately, spending a great deal of money more than they apparently earn, and are suspected of being interested in intelligence work." There are named or identified twelve persons, together with considerable of the personal occupations and activities of each individual and some groups.

Report No. 505 (R. 284), Govts. Ex. 6 (p).

This report concerns an individual Japanese and the

fact that he is Public Relations Director for a Japanese steamship line, staying at the Ambassador Hotel and leaving the next week for New Orleans via the Grand Canyon. Also that he will continue his trip to other points in the United States in order to prepare the way for two around the world passenger vessels to be completed in 1939. While he was reported to be at the Ambassador Hotel, a check made on him indicated no one by that name was registered there and that a further check would be taken.

Report No. 504 (R. 284), Govts. Ex. 6 (q).

This report concerns two Japanese said to be "lieutenants" of another Japanese in the Tokio Club in Los Angeles and is said to be hiding in Stockton, California and that they had not returned to Japan as the Tokio Club had planned for them to do. Another Japanese was reported as also in hiding with his two friends.

Report No. 503 (R. 285), Govts. Ex. 6 (r).

This report concerns a meeting of the "Far East Research Institute" held on June 9, 1938, at the Olympic Hotel in the rooms of the Los Angeles Chamber of Commerce, where a Japanese author gave a lecture on the "Abacus" to about ten people, and concerning conversations had at the meeting and manner of delivery of the lecturer and lack of interest of the audience.

Report No. 495 (R. 287), Govts. Ex. 6 (s).

This report discusses certain reported group tendencies amongst the Japanese, it being said that the

Issei (Japanese born in Japan) and Nisei (American born Japanese) and the Bussei (Japanese of Buddhist faith) are in conflict particularly in the Japanese American Citizens League. Also, certain comment on the control by gambling house known as the Tokio Club and their effort at disciplining patrons found gambling in a Chinese gambling club.

Report No. 489 (R. 288), Govts. Ex. 6 (t).

This report concerns two Lieutenant Commanders of the Imperial Japanese Navy, one of whom will relieve another Japanese here. "Little information is available," it is said, except that one of the subjects "drinks very little, plays golf" and is otherwise engaged.

Report No. 482 (R. 289), Govts. Ex. 6 (u).

This report concerns two Japanese who are said to have requested the General Petroleum Corporation permission to inspect their refineries in Los Angeles.

Report No. 480 (R. 289), Govts. Ex. 6 (v).

This report concerns certain Japanese, including two of those mentioned in the next prior exhibit and reports their return to Los Angeles after inspecting various oil refineries in the East and purchasing certain equipment. Also, they were shown about the oil industry at Los Angeles, made a trip to San Francisco and are to come back to Los Angeles and sail on an oil tanker. Another individual is reported as Pacific Coast manager for a corporation.

Report No. 479 (R. 291), Govts. Ex. 6 (w).

This report concerns the arrival and departure of Japanese officers of the Imperial Japanese Navy.

Report No. 477 (R. 291), Govts. Ex. 6 (x).

This report concerns the arrival of a Japanese officer and that he is stopping at the Olympic Hotel and that he is the "relief" of a Lieutenant Commander of the Imperial Japanese Navy.

Report No. 472 (R. 291), Govts. Ex. 6 (y).

This report concerns a Japanese officer in the Imperial Japanese Navy that he arrived in Los Angeles May 28th, was staying at the Olympic Hotel and expected to depart for San Francisco.

Report No. 469 (R. 292), Govts. Ex. 6 (z).

This report concerns a Lieutenant Commander in the Imperial Japanese Navy and the fact that he returned to Los Angeles from the East, driving a 1937 Chevrolet coach, with a D. C. license number.

Report No. 466 (R. 292), Govts. Ex. 6 (aa).

This report concerns the same Japanese Lieutenant Commander, the subject of exhibit 6 (z), and is prior dated. It merely states that he is expected to return from the East, driving a new car for some person in Los Angeles.

Report No. 465 (R. 293), Govts. Ex. 6 (bb).

This report concerns Japanese individual said to have arrived in Los Angeles on May 24th and that he left for San Francisco May 25. While here staying at the Miyako Hotel.

Report No. 439 (R. 293), Govts. Ex. 6 (cc).

This report refers to a Japanese woman "who is the girl friend" of a Japanese named in the report, and it is said that she has moved out of the Olympic Hotel into the San Pedro Building across the street. Also that the Japanese is expected back from the East the middle of June.

Report No. 435 (R. 294), Govts. Ex. 6 (dd).

This report concerns a Japanese Engineer-Commander of the Imperial Japanese Navy, and it is said that he arrived on May 14th and departed for San Francisco on May 17th and while here stayed at the Miyako Hotel.

Second: Certain Reports Covered and Were Concerned With Japanese Activities Outside the United States, Principally in Mexico and Mexican Waters.

Report No. 570 (R. 270), Govts. Ex. 6 (a).

This report states that "some data deduced from reliable informants and also from definite indications, it

is becoming more and more apparent that Germany, Japan and Mexico are tied up together in espionage activities in this country. It is believed that the various German-American and Japanese-American Chambers of Commerce are serving as centers of this work."

Report No. 560 (R. 271), Govts. Ex. 6 (b).

This report concerns certain Japanese fishing boats. The history and activities of the Japanese fishing boat "Flying Cloud" is given. Particularly is detailed the handling of certain drums of reported acid material, some of which had been docked in the harbor at Hawaii by a Japanese fishing boat, resulting in the plates of a vessel being twenty-five per cent eaten away. Also there is reported the arrest of two Japanese by the California Fish and Game Commission for using acid near Terminal Island to catch fish, the acid having been reported to "eat away a large cable." It is said that "all of these facts have not been checked as yet and an investigation will be conducted." Also that the Flying Cloud is reported to do little fishing, is reported to provision fuel from a Japanese vessel, flies the American flag in American ports, and out to sea flies the Japanese flag, has a radio set capable of reaching Japan, and carries a Japanese expert radio operator. Also there is reported the occasion when two American warships joined the fleet at Long Beach, a Japanese freighter left her berth from Wilmington and took an unnatural course to pass the cruisers close aboard. Also that two large cameras were used to photograph the cruisers, and that three fishing boats left the fish harbor and set out to meet them. Also that the second officer of a Japanese

freighter joined some friends ashore, drove to the edge of Reeves Field and took pictures.

Report No. 536 (R. 275), Govts. Ex. (e).

This report concerns some Japanese individual reported to have been a former consul at San Salvador and promoted to Charge d'Affaires at Panama under a minister at Mexico City. There is reference to "Ken" article on Japanese spies in the first issue. Also that he made statements that a Japanese vessel named "has finished its work off Panama and has shifted to Chile." Owner of the boat mentioned has lumber interests in Chile. Subject wears glasses and his itinerary on a trip is noted. Report also concerns another Japanese from Tokyo interested in mining in California and Nevada who will be in this country for several weeks, and plans to go to Joplin, Missouri, to look into the zinc question, and is suspected of having financial interests in mines in this country.

Third: Reports Which Concern Alleged Communists in the United States.

Report No. 833 (R. 259), Govts. Ex. 5 (a).

This report under the head of activities of Japanese names three American-born Japanese who resigned from the Japanese American Citizens League "because they were accused of indulging in Communist activities." Nothing further could be obtained regarding their activities, but a note is made that "this office is of the belief that the informant could discover more con-

cerning this matter but he lacks the energy and the ingenuity to get it."

Report No. 841 (R. 260), Govts. Ex. 5 (b).

This report, under the head of Japanese activities, refers to further information concerning "inter-Japanese strife." It is said that one of the Japanese belonging to a group which was neither Fascist nor Nazi was taken to mean that he was a Communist, whereupon he was beaten up by certain other Japanese and forced to sign papers to that effect, and a "welfare officer" was asked to help clear up the mess and "the report in the newspapers concerning all these people" was said to have been due to an effort to "whitewash" the Japanese.

Report No. 889 (R. 261), Govts. Ex. 5 (c).

This report recites that certain information as having been phoned in by one Shively, who was later contacted. He was said to have been formerly in the Navy, having received a bad conduct discharge. Since then he has been employed in various cities all over the United States and was now a special night watchman. He had contacted an old shipmate who, he said, was a member of the Communist Party. Shively said he located one Simmons and Rayburn in San Diego but had not seen them, and that Simmons works on North Island and was a civil service employee in the aircraft division, and was a Communist, and also belonged to the I-V (S), USNR, San Diego, and operated on Eagle Boat No. 34. Also that Rayburn was reported to "belong to the Communists in San Diego," and was an officer in the Party. The report then states: "Shively is very anxious to have

his bad conduct discharge fixed up, and it is my opinion he is using this means to assist him in the matter."

Reports Introduced and Admitted Only Against Salich

There were certain reports which were offered only against Salich and were admitted only as to him. These were all included in the indictment.

Report No. 1145 (R. 262), Govts. Ex. 5 (d).

This concerns two Japanese individuals registered at the Ambassador Hotel in Los Angeles.

Report No. 1139 (R. 263), Govts. Ex. 5 (e).

This is a report on two Lieutenant Commanders of the Imperial Japanese Navy, listed as a "rumor".

Report No. 1133 (R. 263), Govts. Ex. 5 (f).

This report concerns activities of the "Japanese Association in collecting money for the Japanese War Saving Fund."

Report No. 1132 (R. 264), Govts. Ex. 5 (g).

This report concerns a "chemical professor in a girls' school in Tokyo" who is said to have perfected a fibre helmet about one-fifth the weight of steel, which material can be used for men going through barb wire entanglements. It is also reported that the manufacture of fibre helmets and gloves has already started.

Report No. 1130 (R. 264), Govts. Ex. 5 (h).

This is a report on the individual owner of a printing shop in San Francisco "who has a reputation amongst Japanese of being an active 'Red'." His daughter is said to be in Japan and married to a Japanese naval officer.

Report No. 1129 (R. 265), Govts. Ex. 5 (i).

This is a report on two Japanese individuals who work on a Japanese vessel and make contact with certain other Japanese in the report named.

Report No. 897 (R. 265), Govts. Ex. 5 (j).

This is a report on two Japanese now on "talking tour" to get donations for the Japanese.

Report No. 1110 (R. 266), Govts. Ex. 5 (k).

This report concerns activities of a Japanese girl apparently in love with a United States sailor. It reports at length her contact and amours with him.

Report No. 1104 (R. 2680), Govts. Ex. 5 (l).

This report concerns a "secret dinner at Shogatsun Tei restaurant in Los Angeles." It is said to have been attended by certain Japanese who were described and identified in part.

Report No. 1081 (R. 269), Govts. Ex. 5 (m).

This report refers to the activities of certain vessels of the "Yamashita Line" and to their anchoring loca-

tions close to the naval anchorages in San Pedro harbor. Also to the fact they are seen taking certain photographs and the activity of certain Japanese in photographing military plans. Also interest of Japenese in purchasing air view of San Pedro area of oil fields and refineries "which unquestionably shows their obtaining every bit of information concerning our defenses and vulnerable spots." It contains the significant comment of the reporting officers, "*in view of the facts that there is no law against such indiscriminate photographing of everything*, government agencies are handicapped in their effort to assure national security and it is recommended that the prohibited zones bill be placed in effect as soon as possible."

COMMENTS ON REPORTS

As well stated in the opinion of the Circuit Court of Appeals in this case (R. 715) "*none of the reports contained any information regarding the army, the navy, any part thereof, their equipment, munitions, supplies or aircraft or anything* pertaining thereto . . . Most of them, on their face appear innocuous, there being no way to connect them with other material which the Naval Intelligence may have, so that the importance of the reports does not appear."

As has been noted, all of the reports consisted of letters or communications by the Assistant District Intelligence Officer at San Diego. The procedure to secure information from which the reports were made, ordinarily was for the investigators (Salich and Stanley) to receive an assignment which they would then execute to the best of their own judgment. Also, they were on the look-out for any information which might come to their

attention which might be of interest to the Naval Intelligence (R. 344, 355). These were the specific instructions of their superior, Lt. Comm. Claiborne (R. 302). During the period covered by the indictment in this case, persons under investigation were principally Japanese. These two investigators usually worked together. They used an automobile and apartment jointly and in part shared the expense which this entailed (R. 128).

The investigators, after making personal contacts and inquiries, consulting hotel records, etc., would then prepare their own form of report to the commanding officer at San Pedro. These reports were usually in longhand or typewritten. Also oral reports were made. According to Chief Yeoman Hanna (R. 111, 112, 121) these investigators' reports would some times be brought to the office already prepared. The oral information and the investigators' reports were considered by the Assistant District Intelligence Officer who evaluated them and then dictated "reports" for forwarding to San Diego.

The regulations under which an officer of the Naval Intelligence operates are in writing and are promulgated by the Chief of Naval Operations. Whatever was done by the officers in charge and investigators pursuant to some written regulation of the Navy Department (R. 256). However, there are certain regulations concerning the office of Naval Intelligence "that are not open to the eyes of the public" or to anyone outside of the Naval Service (R. 258). There is no evidence that Salich even had knowledge of such secret regulations and instructions.

However, it is pertinent here to consider certain of these regulations which are made pursuant to statutory authority (34 U. S. C. 591) by the Chief of Naval Oper-

ations, which is an office created by and with powers fixed by statute (5 U. S. C. 422, 427). The U. S. Navy regulations as promulgated by the Secretary of the Navy under date of September 17, 1920, and as amended and in force and effect during the period covered by the indictment in this case is a special regulation which directs the manner of classifying "information." It directs the classification into three categories, (1) secret, (2) confidential or (3) restricted. The regulations provide the mechanics for classifying information and rules governing the safeguarding and transmission of such classified matter. The three categories are described in the regulation as follows:

> "*Secret* matter is matter of such a nature that its disclosure might endanger the national security, or cause serious injury to the interests or prestige of the Nation or any Government activity thereof.
>
> "*Confidential* matter is matter of such a nature that its disclosure, while not endangering the national security, would be prejudicial to the interests or prestige of the Nation or any Government activity thereof.
>
> "*Restricted* matter is matter of such a nature that its disclosure should be limited for reasons of administrative privacy; or, is matter not classified as *confidential* because the benefits to be gained by a lower classification outweigh the value of the additional security obtained from the higher classification."

It will be noted that *secret matter* is such that *its disclosure might endanger the national security, or cause*

serious injury to the nation, while *confidential matter* "would be prejudicial to the nation," "while *not* endangering the national security."

The charge in the indictment in this case does not, nor does any of the evidence, indicate the obtaining or transmission, or any attempt so to do, of "*secret*" matter or information. The indictment only refers to "*confidential*" reports and information. The evidence is uncontradicted that Salich did not even have access to *secret* matter or information, that is "matter of such a nature that its disclosure might endanger the national security."

It is important to consider this differentiated classification in the Regulations of the Navy and to view it in the light of the practice of the Office of Naval Intelligence. It will be remembered that five copies of these surveillance reports were made, three of them being forwarded to San Diego, one being filed in the office indexed file and one copy being kept by Yeoman Hanna's desk so that they would be available for inspection and survey by the two investigators Salich and Stanley (R. 112, 385).

It is inconceivable that the responsible commanding officers in charge of the Naval Intelligence work would thus handle any information which they thought or had reason to believe "might endanger the national security." In other words, such officers, highly skilled, especially trained and responsible did not consider this report information of such a nature that its disclosure would endanger the national security or cause serious injury to the United States.

Consider also the fact that the investigators in charge of obtaining this information and who had access to it and were required to review it, *were not enlisted or*

commissioned men under any oath or obligation and subject to court-martial and discipline for breach of duty. (*Articles for the Government of Navy*, 34 U. S. C., Sec. 1200, Art. 8, Subd. 20th). And in time of war punishable by death (*Idem.* Art. 4.) They were both salaried employees, privately hired to do certain investigating work of a non-secret nature and to report their investigation.

Consider also the fact that although much was made upon the trial of the *secrecy* with which the identity and work of Salich and Stanley was to be clothed, Gorin knew of Salich's employment (R. 100, 229, 301). This knowledge was reported to Rochefort, with Gorin's "proposition." *Notwithstanding such knowledge on Gorin's part, Commander Rochefort directed continued contact with Gorin, both by Salich and Stanley* (R. 116, 135, 340).

No report was made by Rochefort to his superior of Gorin's "proposition" to buy information—although a detailed statement was dictated covering it, of which only an original was transcribed and placed in Salich's "personnel" file at San Pedro (R. 120, 123, 124). This conduct strikes at the whole picture *of secret and confidential* information vital to "national defense" made on the trial. *Here an employee of Intourist, a Russian travel bureau, had offered to buy information contained in the files of the Naval Intelligence from an employee of that service, and such offer was not even reported to the District Intelligence Officer at San Diego.* Instead, there were instructions to continue to contact him—only that Stanley should be along.

Thus it will be seen that the responsible directing officers of the Naval Intelligence did not consider the information contained in the surveillance reports or

known to Salich as a part of the "national defense," or "relating to the national defense," or "connected with the national defense," or "respecting national defense" in any sense as provided by the regulations of the Navy. Under such circumstances, how can it be said that a court or jury could properly construe such reports to be within the meaning of the Espionage Act? As a matter of law, on their face, and particularly under the circumstances under which they were compiled and dealt with by the Naval Intelligence as shown by the evidence, they were inadmissible and barred as evidence because patently under any sort of proper construction they could not be said to "relate to the national defense."

No further reference is made to the reports, except to suggest that they should be read, having in mind their manner of compilation, to whom access to them was given and their nature. They were well described as being innocuous, informal communications which have no reference to any of the places and things defined in Section 1 as constituting instruments of the national defense, and do not amount in fact to material disclosures either injurious to the U. S. or advantageous to any other nation. They cannot be held to be "information relating to the national defense" within the meaning of the Espionage Act; and their admission, or that of any one of them, into evidence was error on the part of the trial court. Likewise their consideration by the trial court on the motion to dismiss made after the opening statement of the United States Attorney and when such reports were before the court, should have been granted. The reports cannot be said to be of such a nature as to support and sustain a conviction.